United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

FOR MR. JUSTICE VAN ORSDEL.

TRANSCRIPT OF RECORD.

Court of Appeals, District of Columbia

APRIL TERM, 1912.

No. 2392. 893

THOMPSON-STARRETT COMPANY, A CORPORATION, APPELLANT,

vs.

JOHN D. WILSON.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

FILED FEBRUARY 14, 1912.

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Court of Appeals, District of Columbia

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No. 2392.

THOMPSON-STARRETT COMPANY, A CORPORATION, APPELLANT,

vs.

JOHN D. WILSON, APPELLEE.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

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In the Court of Appeals of the District of Columbia.

No. 2392.

THOMPSON-STARRETT CO., &c., Appellant,
vs.
JOHN D. WILSON.

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a Supreme Court of the District of Columbia.

At Law. No. 52570.

JOHN D. WILSON, Plaintiff,
vs.
THOMPSON-STARRETT COMPANY, a Corporation, Defendant.

UNITED STATES OF AMERICA,
District of Columbia, ss:

Be it remembered, That in the Supreme Court of the District of Columbia, at the City of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had in the above-entitled cause, to wit:

1 *Declaration.*

Filed April 22, 1910.

In the Supreme Court of the District of Columbia.

At Law. No. 52570.

JOHN D. WILSON, Plaintiff,
vs.
THOMPSON-STARRETT COMPANY, a Corporation, Defendant.

The plaintiff, John D. Wilson, sues the defendant, a body corporate, for that whereas at the time of the committing of the grievances hereinafter mentioned, the defendant, the business of which was that of constructing and erecting buildings as a contractor, was engaged in the erection and construction, of a certain building in the Naval Hospital grounds in the City of Washington, District of Columbia, and the plaintiff was then and there employed by the de-

fendant as a carpenter in and about and in connection with the erection and construction of said building, which was then and there in a partially completed condition; and for that whereas heretofore, to wit, on the 25th day of February, 1910, in said City and District, in the course of the plaintiff's said work and employment, it then and there became and was necessary for him in the performance of his duties as an employee of the defendant, and in obeying the instructions of the defendant, to use a ladder for the purpose of ascending and descending to and from one floor to another of said partially completed building, there being no other means furnished by said defendant to the plaintiff and its other employees,
2 then and there engaged in the construction of said building, for so doing; and it then and there became and was the duty of the defendant to furnish to the plaintiff and its other said employees while they were so engaged in the performance of their duty as aforesaid, for his and their use as aforesaid, a ladder which should be so fixed and placed in position as to be reasonably safe; yet the defendant, not regarding its duty in that behalf, then and there furnished for the use of the plaintiff and its other said employees for the purpose aforesaid, a ladder of great length, to wit, thirty feet, which it, the defendant, had theretofore so negligently and carelessly fixed or placed, or caused to be fixed or placed in position that its use by the plaintiff and defendant's other said employees then and there engaged in the performance of their duty as aforesaid, was rendered dangerous and unsafe, in that although it extended from the first to the third floor of said partially completed building, it was not braced or tied at the point where it passed the second story of said building, which omission to so brace or tie it at the point aforesaid, caused it to swing or vibrate when being used as aforesaid, and also in that it was so fixed or placed at the third floor landing of said building that one of its rungs or steps afforded an unsafe, insecure and dangerous foothold to any one using it for the purpose of ascending or descending as aforesaid; and for that whereas while the plaintiff, in the course of his employment as aforesaid, and on the day and year aforesaid, was descending from the third floor to one of the lower floors of said partially com-
3 pleted building by means of said ladder, he lost his footing by reason of the swinging or vibration of said ladder, or by reason of the unsafe, insecure and dangerous foothold so afforded as aforesaid, or by reason of both of said causes, and fell a great distance, to wit, thirty-five feet, to and upon the basement floor of said building; and by means whereof, the plaintiff's skull, left arm and nose were fractured and broken, his hearing seriously and permanently impaired and said plaintiff was otherwise greatly bruised, wounded and injured in and about his head, face, one or both of his eyes, arms and legs and suffered and sustained severe and serious internal injuries, all of which said injuries so received as aforesaid were and are of a permanent character and have heretofore totally incapacitated the plaintiff and will totally or partially incapacitate him in the pursuit of his calling, which is that of a carpenter; and also by means of the premises, the said plaintiff

became and was sick, sore, lame and disordered and so remained and continued for a long space of time, to wit, hitherto, during all of which time, the said plaintiff suffered and underwent great pain and was hindered and prevented from pursuing his calling aforesaid, and was hindered and prevented from transacting and attending to his necessary and lawful affairs by him during all that time to be performed and transacted, and lost and was deprived of great gains, profits and advantages which he might and otherwise would have derived and acquired; and thereby also the said plaintiff was and will be forced and obliged to pay, lay out and expend divers
4 large sums of money amounting in the whole to the sum of two thousand dollars ($2,000) in and about endeavoring to be cured of said fracture, bruises and injuries so received as aforesaid. To the damage of the plaintiff, thirty thousand dollars ($30,000) which amount he claims of the defendant besides costs.

2. The plaintiff, John D. Wilson, also sues the defendant, a body corporate, for that whereas at the time of the committing of the grievances hereinafter mentioned, the defendant, the business of which was that of constructing and erecting buildings as a contractor, was engaged in the erection and construction of a certain building in the Naval Hospital grounds in the City of Washington, District of Columbia, and the plaintiff was then and there employed by the defendant as a carpenter in and about and in connection with the erection and construction of said building, which was then and there in a partially completed condition; and for that whereas heretofore, to wit, on the 25th day of February, 1910, in said City and District, in the course of the plaintiff's said work and employment, it then and there became and was necessary for him in the performance of his duties as an employee of the defendant, and in obeying the instructions of the defendant, to use a certain ladder which had been furnished by the defendant for the use of the plaintiff and its other employees in the course of the performance by them of their duties in and about the construction of said partially completed building, which said ladder, which furnished the only means of ascending and descending to and from one floor to another of said partially completed building was of great
5 length, to wit, thirty feet, and extended from the first floor to and above the third floor of said partially completed building; and for that whereas said ladder had been so negligently and carelessly fixed or placed in position by said defndant that it afforded an unsafe, and insecure means of ascent and descent as aforesaid, in that one of its rungs or steps, at or near the point where the said ladder was fixed or placed at the third floor landing of said partially completed building, furnished an unsafe, insecure and dangerous foothold to any one stepping upon said rung or step, while using said ladder for the purpose of ascending or descending as aforesaid, of which said unsafe, insecure and dangerous condition, the plaintiff had no notice or knowledge; and for that whereas the defendant then and there knew, or in the exercise of reasonable care, ought to have known of the said unsafe, insecure and dangerous condition as aforesaid, and it was the defendant's duty to have

warned the plaintiff thereof, so that the plaintiff might have avoided the same in the use by him of said ladder as aforesaid; yet the defendant, not regarding its duty in that behalf failed and omitted to warn the plaintiff of said dangerous condition, as aforesaid; and for that whereas by reason of its failure and omission so to warn the plaintiff as aforesaid, the plaintiff on the day and year aforesaid and at the place aforesaid, while in the act of descending, or attem*tp*ing to descend from the third floor of said partially completed building to which he had been sent by direction of said defendant in the course of his employment as aforesaid, and from which
6 it was necessary for him, in the course of his employment, as aforesaid, to return, lost his footing in stepping upon or in attempting to step upon the said rung or step which afforded an unsafe, insecure and dangerous foothold as aforesaid, and fell a great distance, to wit, thirty-five feet, to and upon the basement floor of said building; and by means whereof, the plaintiff's skull, left arm and nose were fractured and broken, his hearing seriously and permanently impaired, and said plaintiff was otherwise greatly bruised, wounded and injured in and about his head, face, one or both of his eyes, arms and legs and suffered and sustained severe and serious internal injuries, all of which said injuries so received as aforesaid were and are of a permanent character and have heretofore totally incapacitated the plaintiff and will totally or partially incapacitate him in the pursuit of his calling, which is that of a carpenter; and also by means for the premises, the said plaintiff became and was sick, sore, lame and disordered and so remained and continued for a long space of time, to wit, hitherto, during all of which time, the said plaintiff suffered and underwent great pain and was hindered and prevented from pursuing his calling aforesaid, and was hindered and prevented from transacting and attending to his necessary and lawful affairs by him during all that time to be performed and transacted and lost and was deprived of great gains, profits and advantages which he might and otherwise would have derived and acquired; and thereby also the said plain-
7 tiff was and will be forced and obliged to pay, lay out and expend divers large sums of money amounting in the whole to the sum of two thousand dollars ($2,000) in and about endeavoring to be cured of said fracture, bruises and injuries so received as aforesaid. To the damage of the plaintiff, thirty thousand dollars ($30,000) which amount he claims of the defendant besides costs.

TUCKER, KENYON & MACFARLAND,
Attorneys for Plaintiff.

Motion to Strike Out First Count of Declaration.

Filed May 19, 1910.

* * * * * * *

Now comes the defendant and moves the court to strike out the first count in the plaintiff's declaration herein, and as grounds for this motion says that the said count is bad for duplicity in pleading.

SLEMAN AND LERCH,
Attorneys for Defendant.

Demurrer to Second Count of the Declaration.

Filed May 19, 1910.

* * * * * * *

The defendant says that the second count to the plaintiff's declaration is bad in substance.

SLEMAN AND LERCH,
Attorneys for Defendant.

8 NOTE.—Among the points of law to be argued in connection with the above demurrer is that the said count in said declaration wholly fails to set forth facts constituting a cause of action against the defendant.

Supreme Court of the District of Columbia.

FRIDAY, *May* 27, 1910.

Session resumed pursuant to adjournment, Mr. Justice Wright presiding.

* * * * * * *

Upon consideration of the defendant's motion to strike out the first count of the plaintiff's declaration filed herein, it is ordered that said motion be, and it is hereby overruled to which the defendant notes an exception.

MONDAY, *June*, 6, 1910.

Session resumed pursuant to adjournment, Mr. Justice Wright presiding.

* * * * * * *

Upon consideration of the defendant's demurrer to the second count of the plaintiff's declaration herein, it is ordered that said demurrer be, and it is hereby overruled.

9 *Plea.*

Filed June 13, 1910.

* * * * * * *

For plea to the first and second counts of the plaintiff's declaration the defendant says it is not guilty, as alleged.

SLEMAN AND LERCH,
Attorneys for Defendant.

Joinder of Issue.

Filed June 15, 1910.

* * * * * * *

The plaintiff joins issue upon the plea of the defendant.

TUCKER, KENYON AND MACFARLAND,
Attorneys for Plaintiff.

Memorandum.

November 10, 1911.—Verdict for Plaintiff for $7,000.

10 Supreme Court of the District of Columbia.

FRIDAY, *November* 17, 1911.

Session resumed pursuant to adjournment, Mr. Justice Stafford, presiding.

At Law. No. 52570.

JOHN D. WILSON, Pl'tf,
vs.
THOMPSON-STARRETT COMPANY, a Corporation, Def't.

Now come here as well the plaintiff by his Attorneys Messrs. Tucker, Kenyon and Macfarland as the defendant by its Attorneys Messrs. Sleman and Lerch and W. J. Lambert; whereupon the defendant's motion for a new trial coming on to be heard, it is considered that the same be, and hereby is overruled, and judgment on verdict ordered.

Therefore, it is considered that the plaintiff herein recover against the defendant herein, the sum of Seven thousand dollars ($7,000.) with interest thereon from this date, being the money payable by said defendant to the plaintiff, by reason of the premises, together with the costs of suit, to be taxed by the Clerk and have execution thereof.

The defendant by its Attorneys in open Court notes an appeal to the Court of Appeals of the District of Columbia, and the penalty of the bond on said appeal to act as a Supersedeas is hereby fixed in the sum of Ten thousand dollars ($10,000.00) or, in lieu thereof, a bond for costs in the sum of one hundred dollars ($100.)

11 *Memorandum.*

December 4, 1911.—Appeal bond (Supersedeas) approved and filed.

Supreme Court of the District of Columbia.

FRIDAY, *December 22d*, 1911.

Session resumed pursuant to adjournment, Mr. Justice Stafford, presiding.

At Law. No. 52570.

JOHN D. WILSON, Pl't'f,
vs.
THOMPSON-STARRETT COMPANY, a Corporation, Def't.

Now comes here the defendant by its Attorneys and submits to the Court its bill of exceptions taken during the trial of this cause, and the same is taken under consideration.

Upon motion of the Attorneys for the defendant, it is ordered that the time for filing the transcript of record in this cause in the Court of Appeals of the District of Columbia, be, and it is hereby extended to and including January 20, 1912.

Memorandum.

January 19, 1912.—Time to file transcript of record in the Court of Appeals further extended to and including January 27, 1912.

12 Supreme Court of the District of Columbia.

TUESDAY, *January* 23, 1912.

Session resumed pursuant to adjournment, Mr. Justice Stafford presiding.

* * * * * * *

At Law. No. 52570.

JOHN D. WILSON, Pl't'f,
vs.
THOMPSON-STARRETT COMPANY, a Corporation, Def't.

The Court having this day signed the bill of exceptions heretofore submitted herein, now orders the same of record as of the time of the noting thereof at the trial.

Upon motion of the Attorneys for the defendant in open Court, it is ordered that the time within which to file the transcript of record in this cause in the Court of Appeals of the District of Columbia, be, and it is hereby further extended to and including February 15, 1912.

13 *Bill of Exceptions.*

Filed January 23, 1912.

In the Supreme Court of the District of Columbia.

At Law. No. 52570.

JOHN D. WILSON, Plaintiff,
v.
THOMPSON-STARRETT COMPANY, a Corporation, Defendant.

Be it remembered that the above entitled cause came on for hearing on November 7th, November 8th, November 9th and November 10th, 1911, before Mr. Justice Stafford and the jury.

And thereupon, after the jury had been duly sworn, and all the witnesses, except the plaintiff, excluded from the court room, the plaintiff, to maintain the issue on his part joined, called as a witness, JOHN HAUPT, who testified in substance as follows:

That he is a steward at the Naval Hospital and took some pictures of the ladder in the sick officers' quarters, in February, 1910, at the request of plaintiff's son, John D. Wilson; that he took the pictures on the Sunday following the accident to plaintiff, or the Sunday after that—he does not remember which; the pictures in
14 question were shown the witness, who identified them, and they were marked by the stenographer for identification as "No. 1" and "No. 2." Witness stated that picture No. 1 represented the lower part of the ladder, and picture No. 2 the upper part of the ladder; that he did not take one picture of the entire ladder because the camera would not take it; that in taking picture No. 1 he placed the camera on the first floor, looking up, and taking picture No. 2, placed the camera on the second floor looking up; that the two pictures put together represent nearly the whole ladder.

On cross-examination the witness testified that he had never been in this hospital building before the time he took these photographs; that he was not there at the time of the accident; that he would say it was either the first or the second Sunday after the accident that he took the pictures; that that would be as close as he could place it; that he is not a regular photographer, but does amateur work; that of his own knowledge he knew nothing as to whether the conditions at the time he took the pictures were the same as when the accident occurred; that the pictures show all but about six (6) inches of the ladder at the top, but that he could not give any idea as to how far it extended down at the bottom; that at the time he took these photographs the work on the building had not been completed; that there were no stairs at all.

15 And plaintiff, to maintain the issue on his part joined, called as a witness, HERBERT C. JONES, who testified substantially as follows:

That he is a steamfitter, employed at the Bureau of Standards, and that he was employed in February, 1910, by the Marine Engine and Machine Company, at the Naval Hospital, as an elevator constructor; that his employer was a sub-contractor of the defendant the Thompson-Starrett Company, the contractor for the putting up of the sick officers' quarters; that he had been working at the Naval Hospital between four and five weeks prior to the 25th of February, 1910; that he had been working on the sick officers' quarters and the other building just below, and on those two buildings off and on; that he did not know the plaintiff until the day of the accident; that he saw the accident; that his foreman, Mr. Kracke, sent Mr Colbert and himself up on the second floor to drill some holes in the iron; that they were in the elevator shaft right beside this ladder; that as they were working there the witness happened to glance up and saw a shadow over him and saw Mr. Wilson just as he went to put his foot on the ladder; that as Wilson caught hold of the round, his toes slipped, and down he came and he landed on the first floor and rolled off a board down to the basement, and struck his head on the concrete pit that they had for an elevator shaft; that the ladder was used for workmen to go up and down from the first to the third floor; that there was no stairway or other means for the workmen to get from the first to the third floor; that the ladder was the Thompson-Starrett Company's; that the ladder was a wooden ladder with one iron piece of pipe in

16 one round between first and second floors, the rest of the rungs being of wood; that the rungs were supposed to be round, but they had been worn off; that the ladder rested on boards that had been extended out from the first floor into the elevator shaft and stairway; that there were three or four boards extended from the first floor out into the elevator shaft and this ladder was resting on the boards; that it was nailed at the bottom and extended up to the third floor and about five or six feet above the third floor; that the ladder was about thirty or thirty-five feet long; that it was fastened at the third floor and the bottom floor; that it was nailed in with a board at the third floor, and there was a piece extended from the studding at the third floor and run out to the side of the ladder, and nailed in on the sides; that he knows what rung Mr. Wilson put his foot on; that there was something back of that rung; that there was a piece of studding about an inch behind that rung and in going up or down this ladder a man could not get a proper foothold, because this studding that was put there would not allow your foot to slip in on the rung; that when you put your foot on the rung you could only get the toe of your shoe, about an inch of it, probably only the tip of your shoe, on this rung. He saw Mr. Wilson attempt to step on that rung; that he knows you could not get a sufficient foothold on that rung because he had slipped on it himself before the accident, in going down the ladder; that he does not know why he didn't fall; supposes it

was luck; that he happened to save himself with his hand; that he cautioned the fellow that was with him about this rung; that he was the first one on the ladder of the two of them and slipped
17 and caught himself with his hands; that this occurred about a week, or probably two weeks before the accident to Mr. Wilson; that that was the only occasion he had slipped, because he had remembered it after that, and his foreman, Mr. Kracke, also cautioned them about that rung; that every time he sent them up stairs there to do any work he cautioned them about that rung; that there was a swing to the ladder, because this five or six feet which was extending at the top being tied in at the third floor, and not tied in at the second, and tied in at the first floor, gave it a swing at the second floor; that the ladder at the second floor was from one to two feet from the floor.

Q. Mr. Jones, will you look at these two pictures, assuming that they should be held like that (indicating) and tell us whether you recognize those pictures?

Mr. LAMBERT: I object to the use of these pictures. They have not been offered in evidence, and when they are offered in evidence I shall want an opportunity——

The COURT: What do you wish to ask about them.

Mr. TUCKER: I had not finished the question. I was going to ask him whether he recognized those pictures as pictures of this ladder; then I intended to follow up that examination by showing, by the witness, that they correctly represent the position of the ladder, and the way it was fastened, with certain exceptions, and have him point out what differences there were. * * * It is admitted, of course, if the court please, that the pictures do not represent exactly the way they were tied up there at the time. I
18 was going to have the witness explain the difference.

The COURT: Mr. Lambert, do you object to the use of the pictures as an illustration?

Mr. LAMBERT: Yes, may it please the court, for this reason: Counsel indicate that they desire to point out certain differences. I submit it is only doing indirectly what, clearly, they cannot do directly. Your Honor will remember that those pictures were taken by a gentleman who said that he was there either the first Sunday or the second Sunday after the occurrence had taken place, and he has not identified them as being according to the situation at that time. If anything was done subsequently to the accident I submit it would not be proper evidence to be admitted in this case. I take it that the plaintiff can only try his case on what took place before and what was the situation at the time.

The COURT: Of course there is no doubt about that. That is proper.

Mr. LAMBERT: To use them as an illustration after a change had been made would be the same as putting a witness on the stand and saying "Was anything done afterwards?" I submit that is clearly improper.

Mr. TUCKER: If the court please, there is not any doubt in the world that we are not entitled to show any changes that were made

in the situation. But it does not necessarily follow from that that we cannot show by a photograph for the aid of the jury the
19 condition as it existed then, after showing what changes had been made. Of course the jury will be instructed that no changes that had been made could affect the liability of the defendant. If you followed out Mr. Lambert's reasoning the result would be that the defendant could prevent the use of any pictures at all, by having a change made.

Mr. LAMBERT: Oh, no!

After further argument the following occurred:

Mr. TUCKER: I offer to show by this witness, that the pictures heretofore identified, correctly represent the position of the ladder in question at the time of the accident, with certain changes, which the witness will indicate in his testimony; the object of the offer being to place before the jury a pictorial representation of the ladder as it stood on the day of the accident.

The COURT: That offer is admitted. An exception will be noted in favor of the defendant.

The witness further testified substantially as follows:

That he was not present at the time the pictures were taken; that they were no doubt pictures of the ladder; that they are correct pictures of the ladder and its position on the day Mr. Wilson was injured, directly before the accident, except for certain changes or differences; that on picture No. 2 the studding is not there,
20 for one thing; that it is not behind this rung that he fell from; that on picture No. 1 the ladder has been braced at the second floor; it was not braced before the accident.

Mr. LAMBERT: That goes in, I suppose, under the same exception?

The COURT: This is all under the exception. The record shows what the court thinks of it.

Q. You have referred, Mr. Jones, to a piece of studding. Please take this pencil and mark that piece of studding that you say was changed after the accident. Just mark it with a pencil. Mark it with your initials—just with a "J." A. What do you mean—the exact place where it was?

A. Where it was, yes. A. Right behind that second row, (indicating).

That there were no other differences than those indicated between the ladder as it stood before the accident and as shown by those pictures.

Q. Will you mark with a pencil the rung of the ladder on which you say Mr. Wilson stepped, and from which his foot slipped? A. I have marked "J" just over the top of the rung.

* * * * * * *

Q. I want you to mark the rung itself. A. It is right here.

Q. Mark the rung itself on the left hand side of the ladder. Mark it so it will stay.

(The witness made a mark as requested.)

was luck; that he happened to save himself with his hand; that he cautioned the fellow that was with him about this rung; that he was the first one on the ladder of the two of them and slipped
17 and caught himself with his hands; that this occurred about a week, or probably two weeks before the accident to Mr. Wilson; that that was the only occasion he had slipped, because he had remembered it after that, and his foreman, Mr. Kracke, also cautioned them about that rung; that every time he sent them up stairs there to do any work he cautioned them about that rung; that there was a swing to the ladder, because this five or six feet which was extending at the top being tied in at the third floor, and not tied in at the second, and tied in at the first floor, gave it a swing at the second floor; that the ladder at the second floor was from one to two feet from the floor.

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Q. You have referred, Mr. Jones, to a piece of studding. Please take this pencil and mark that piece of studding that you say was changed after the accident. Just mark it with a pencil. Mark it with your initials—just with a "J." A. What do you mean—the exact place where it was?

A. Where it was, yes. A. Right behind that second row, (indicating).

That there were no other differences than those indicated between the ladder as it stood before the accident and as shown by those pictures.

Q. Will you mark with a pencil the rung of the ladder on which you say Mr. Wilson stepped, and from which his foot slipped? A. I have marked "J" just over the top of the rung.

* * * * * * *

Q. I want you to mark the rung itself. A. It is right here.

Q. Mark the rung itself on the left hand side of the ladder. Mark it so it will stay.

(The witness made a mark as requested.)

21 That before the accident there was a piece of studding back of that rung about one inch thick and two inches wide; that the outer facing of that piece was about an inch from the inner part of the rung; that the studding came about to the center of this rung; that that made about half an inch or probably a little more, extending above the top of the rung; that the rung was but three-quarters' of an inch below the upper edge of the studding; that he saw Mr. Wilson's foot touch that rung as he attempted to descend; that his foot slipped and he came down at arms' length and then his hands gave way; that he went to the full extent of his arms; that at the time of the accident there was a piece of timber which projected beyond the ladder, or you might say, in front of the ladder; (looking at the picture) that that piece of timber is not shown in the picture; that that is another difference; that there is a piece of it shown on the photograph now, but it looks as if it has been cut off; (the witness at request of counsel put a "J" at the end of the piece of timber) that before the accident the piece of timber was about two feet longer than now shown on the photograph and about two or three feet from the face of the ladder; that when one descended or ascended the ladder he went between that piece of timber and the ladder; that he does not think Mr. Wilson struck that piece of timber when he fell; that he never noticed that point; that he thinks the name of the foreman of the Thompson-Starrett Company immediately over Mr. Wilson, is McNulty, or something like that; that Mr. McNulty was on duty the day Mr. Wilson was hurt and he saw him there at work; that he saw him McNulty go up and down the ladder two or three times a day; that there
22 were probably twenty-five or thirty men working on this particular building the day plaintiff was hurt; that they were going from one building to the other practically all day long; that he does not know of any changes made in the position of the ladder from the time he first saw it up to the time Mr. Wilson was injured; That the ladder was there the day he went to work there, about five or six weeks before the accident; that he saw Mr. Wilson after he fell; that he was unconscious, and he helped to carry him to the hospital; that he went back to the scene of the accident after helping carry Mr. Wilson to the hospital; that that was about ten or twelve minutes afterwards.

On Cross-examination the witness testified substantially as follows:

That his duties on the job at the Government Hospital was the construction of two elevators. That the stairway wound right around the elevators; that there was one shaft that the elevator ran in; and the stairway when erected would run around one side of the shaft; that the elevator shaft ran from the basement to the top of the building; three floors and basement; that when he came there there was a ladder in the shaft and that was about all; that none of the floors had been finished; that the concrete was on the floors and rested on wooden forms; that when he came there the ladder was nailed at the first floor and nailed at the third; that it was not nailed at the second floor; that at the first floor it was nailed in on boards that

extended out in the shaft; that the face of the ladder was
23 three or four feet out from the first floor in the shaft; that it was on the boards solidly and fastened to them; that he does not know how those boards were fastened; that the top of the ladder was about five or six feet above the third floor; that it was braced at the third floor by pieces of boards that projected out on each side of the ladder, nailed; that these boards were even with the face of the ladder and extended back to the floor; that they were tied in some way and seemed to be firm and were about flush with the face of the ladder; that that is what held it solidly to the third floor; that the two main pieces between where the rungs went were about two or probably three inches wide; that he really does not know the width of them; that there were holes bored through the upright pieces and the rungs went inside there; that the rungs were placed at about the center of the two upright pieces; that between the rung and where the ladder rested there would be a distance of half of the width of the upright pieces; that a person on the third floor coming to get on this ladder would be in such a position that he could take hold of the ladder with his hands or arms before he attempted to step on the rungs; that that was the usual way of coming down; that the board out in the shaft extended from the right hand side to the ladder, as you go up from the bottom of the third floor; that the board was about three or four feet away from the ladder and was about on a line with the second rung next to the third floor; that it was a rough piece of timber and nothing about it that obstructed your view of anything up the shaft; that he does not know if
24 Mr. Wilson hit the board in falling; that there was plenty of space between the ladder and where that board extended out into the shaft, for anybody to pass up and down the ladder, about four feet; that witness was working on the opposite side of the shaft on the second floor at the time of the accident, and was standing on a twelve inch planking across the elevator shaft; that Mr. Colbert, one of the elevator men, was working with him at the time, and he was waiting for Mr. Colbert to finish drilling a hole which they had been sent to do; that the hole was right level with him on the second floor; that he was not drilling that hole but supposes his attention was on the drilling that his associate was doing; that the roof rigth over the top of the elevator shaft was not covered; that the light shone right down and when a man walked over to get on the ladder it reflected a shadow down the shaft; that he does not know what made him glance up, but when that shadow came he wasn't doing anything and just happened to throw his eyes up, like that (indicating) and saw Mr. Wilson just as he put his foot on this rung; that when he put his foot on the rung his hands were on one of the rungs above; that he is sure he had them on the rung and not on the sides of the ladder; that he had both hands on the rung; that he did not have anything in his hands that he knows of; that in that position he put his foot on the rung of the ladder; that then he saw him fall; that the rung he had his hands on and the rung he had his foot on did not give way; that he saw his foot slip off the rung; that the witness was the distance of one of the floors from

where his foot was; about fifteen feet; that he came right
25 down between him and the ladder and struck on the boards that extended out from the first floor that formed a foundation for the ladder, and then rolled off down into the basement; that a new ladder has round rungs in it and as it is used where the feet come on it the rungs flatten out a little if it is used much; that there was nothing broken about this ladder; that when he went to work on this job there were carpenters there, elevator men, plumbers and steamfitters and bricklayers; that at that time and during all this time the ladder had been there just in that same position; that he had occasion to go to the third floor a number of times and had used the ladder; that at the time of the accident about a third of the roof was on and the rest of it was open; that the accident occurred between three and four o'clock in the afternoon, and it was a very bright, sunshiny day; that there was plenty of light; that anybody could see without any difficulty anything around; that the third floor was lighter than the second floor; that the end of piece of studding in connection with the upper rung of the ladder did not project out; that it was a piece of concrete form for the third floor which was nailed to the side which they had not taken down yet; that it was longer than the ladder was wide; that he is not sure whether the ladder rested against that studding or against a board that was fastened at the top; that this studding ran along underneath the board about a foot underneath where the ladder rested against; that he had slipped on the ladder once before the accident; that his toe slipped off this rung where the piece of studding was; that he could not get a proper foothold on the rung, the way the studding was; that after that he didn't use that rung; that he always stepped over that rung and watched it in particular that a man
in a hurry would never notice it; that you could see it
26 if you knew it was there and looked for it; that you could see it if you looked at it; that the first rung of the ladder below the third floor was eight or ten inches below the floor—I should say between six and twelve inches; that he is pretty sure that the piece of board behind the ladder was a piece of the concrete form; that it was immediately below the piece of board that was in front upon which the ladder was resting and just flush with that; that he spoke to Mr. Colbert about the short distance there and about slipping his toe; that his foreman, Mr. Kracke, cautioned the workmen about the close space up there on the third floor; that all who had worked there during the time he was there, had had to use the ladder; that there was no other; that they were going up and down on this ladder all through the day; that he is now employed as a plumber and steamfitter at the Bureau of Standards.

On re-direct examination the witness testified substantially as follows:

That as near as he can recollect the ladder stood out from two to four feet from the perpendicular at the first floor; that the ladder was between thirty and thirty-five feet long, and the distance between the stories about fifteen feet each.

And plaintiff to further maintain the issue on his part joined, called as a witness, WILLIAM A. COLBERT who testified substantially as follows:

That he is an elevator constructor, at present working for
27 the Standard Plunger Elevator Company; that in February, 1910, he was working for the Marine Engine and Machine Company at the Naval Hospital, 24th and E Streets Northwest; that he remembers the accident to the plaintiff; that he was acquainted with the ladder from which Mr. Wilson fell; that he used it several times, and slipped on it; that at the time Mr. Wilson fell the ladder had been there, to his knowledge, about three or four weeks, may be, five weeks; that he was not there when the ladder was put up; that he went to work in that building three or four weeks before Mr. Wilson was hurt; that when he went to work the ladder was in the same position as it was when Mr. Wilson was hurt; that he (witness) slipped on it; that at the third floor there was a piece of inch stuff, by two, he believes, on the form for the cement, right level with the round, like; and you couldn't get a proper foothold there, but if you went to step on, your foot would slip right off and come right off of the round; that you could just barely get your foot on there, may be an inch or so; that he slipped about two or three days before the accident to Mr. Wilson; that every time he would go up there Mr. Kracke would tell us to watch out for ourselves; that he slipped several times going up and coming down, too; that he did not fall because he would catch himself quick with his hand; that the ladder was loose, and had a big spring at the second floor; that it was not tied there at all; that it was fastened at the bottom and top; that there was no other means of going from one floor to another than the ladder; that at the time Mr. Wilson fell witness was working right in the shaft; that Mr. Wilson hollered when he started to fall and he (witness) jumped, that if he had not he guesses Mr. Wilson would have hit him; that he was working in
the elevator shaft right underneath Wilson; that when he
28 first saw him (Wilson) was in the air coming down head foremost, like; that he helped pick him up and carry him to the hospital; that the ladder was about four or five feet out from the perpendicular at the bottom; that the Thompson-Starrett mark was on the ladder; that he does not know whether it belonged to them or not; but that it was their color ladder.

On cross-examination the witness testified substantially as follows:

That he had been on this work four or five weeks at the time the accident happened; that when he went there this ladder was there, and there were plumbers, steamfitters and carpenters working there; that a great many had been working there and everybody who had to work on the second or third floors had to use this ladder in coming up or down; that the ladder had been in the same position during all that time; that he does not know whether the ladder rested on the floor or on the boards in the elevator shaft; that it was solid down at the bottom, and was fastened tight at the third floor; that pieces of wood came out on the side even with the face

of the ladder to which it was nailed, and that these pieces or boards were also nailed on the floor at the third floor; that it did not touch the second floor by about two feet; that it is easier to go up a ladder on an incline than when it is perpendicular; that the distance between floors was about ten to twelve feet or about twenty to twenty-four feet from where the ladder was braced at the first floor to where it was braced at the third floor; that the ladder
29 extended above the floor at the third floor about five or six feet and was plenty high enough for a person coming to get on it to take a good hold; that there were several rungs above the floor of the third floor; that the first rung of the ladder below the floor of the third floor was about two inches, and the distance between that rung and the next rung, about a foot; that all the rungs were in the ladder and none of them were broken; that nothing about the ladder broke; that the side pieces of the ladder were about 3 x 4, and the narrowest side would face you and the broad side would be on each side of the ladder; that each rung was a round rung and would run through about the middle of these broad sides, making it about two inches from the middle of each rung from each side; that some of the rungs were worn pretty well; that the ladder was braced at the third floor by two pieces, one on each side, that came out from the floor; that the ladder was nailed to these pieces; that a piece that had formed a part of the moulding for the cement was directly underneath the top edge of the floor, so that this ladder rested against that, and then it was braced on each side; that this moulding was about an inch thick and twelve inches in width, and about six or seven feet across; that the situation was that that ladder was that way (indicating) with this moulding piece, which was directly flush across the floor, extending six or seven feet sidewise there, and the ladder was against it in that position; that the concrete form came up flush with the edge of the floor and the side pieces of the ladder rested on that form; and the form came up about two inches in the rear
30 above the first rung; that when he first went to work there there was no roof on the building; that at the time of the accident some parts of it were on, but that where they were working at the hatch there was no roof at all; that the accident occurred between three and four o'clock in the afternoon; that between the third floor and the roof there was nothing at all; a part of the floor of the third floor was still uncovered; that he does not remember what kind of a day it was but that there was no difficulty in seeing everything around there on the third floor that day; that the ladder had a spring in it; that when you got about half way of the floor it would spring all the way going up until you got pretty nearly to the top; it would start springing before you got to the second floor and you would notice it until you got pretty nearly to the third floor; that when you got to the third floor where it was braced, the spring would stop and when you started down it would be solid until you got down a few rungs and then it would spring a little until you got down close to where it was braced below; that the spring would not begin on either end until you had gone about

four or five feet; that when he first saw Mr. Wilson he was between the floors; he was coming in the air between the floors about four or five feet down from the third floor; at the time Mr. Wilson fell he (witness) was busy drilling holes and had his attention engrossed in that until he heard this "holler," and then he looked up; that his companion was standing beside him but was not engaging in his work at the time.

31 And thereupon, the plaintiff, to maintain the issues on his part joined, called as a witness, CHARLES KRACKE, who testified substantially as follows:

That he is an elevator constructor and was employed in February, 1910, as District Superintendent of the Marine Engine and Machine Company of New York and was engaged in the installation of two elevators for the Naval Medical School Hospital, Sick Officers' Quarters, and the Contagious Ward; That he recalls the accident to Wilson on February, 25th, 1910; that he saw the accident; that he heard some one holler, and as they hollered he looked up and saw Mr. Wilson's foot leaving the ladder; that the back of his head struck a projecting timber 4 x 4, that was sticking out four or five feet back of the ladder on this floor landing that the ladder was fastened to; that the back of his head struck that piece and he turned a complete tumbleset; that as he came down to the second floor, he struck a projection that threw him off on the side; that he hit the bottom landing and rolled down into the pit, and the side of his head struck the cement cornice of the pit; that he helped to carry Mr. Wilson over to the hospital; that the ladder was approximately thirty-five feet long, rested against the third floor and nailed at that floor; that it was fastened at the bottom landing and top landing, and extended about five or six feet above the top landing; that the ladder was about three feet or more out of the perpendicular; that the rungs were about an inch and a quarter and tapered down to about three-quarters as they entered the side of the ladder; that the timbers were about four by

32 two at the bottom and tapered down at the top to three inches by one and three-quarters; that it was a one piece ladder and had been there four or five weeks; that he had been working in this particular building about five weeks before the accident and knows the ladder was there before the time of the accident for about five or six weeks; that the ladder was not fastened at the second floor; that there was an inch piece of rough stuff, about two inches wide that the ladder was nailed to at the third floor; that this piece of inch rough stuff was fastened on to two cleats, that is, the cleats were beyond the ladder on each side; that this inch piece was nailed on to these two cleats and the ladder fastened to that; that this piece of inch-by-two was three-quarters of an inch or an inch above the rung of the ladder at the top landing; that it was almost a necessity to step on that rung where this cleat was fastened to land on the top landing; that the first time he went up that ladder he slipped on that cleat; that when a man was standing on the top landing about to descend the ladder, looking down, this cleat looked

on the level with the rung, but when witness got down, his foot slipped, and when he got down on the level with this rung and cleat, witness found that it was above the rung and saw it was dangerous, and so notified his men when he went downstairs; that you could get about an inch and a half toe-hold on that rung in ascending or descending the ladder.

Q. Look at these photographs, if you please, Mr. Kracke and tell me what those are photographs of, if you know. A. This
33 one photograph shows that this ladder has been——

Q. Tell me what those are photographs of, first. A. What they are of?

Q. Yes. A. This shows the ladder in position.

Q. Is that the ladder that you refer to? Do they represent the ladder that you have referred to in your testimony? A. Yes, sir.

Q. Do they correctly or incorrectly represent the ladder as it existed at the time of this accident? A. This shows here——

Q. Wait a minute, now. Just answer me yes or no. A. No, sir; they do not represent it.

Q. Do they correctly represent the ladder from which Mr. Wilson fell? A. Yes, sir.

Q. In what respect does it not correctly represent the position of the ladder, or the ladder itself?

Mr. LAMBERT: One minute; I object.

The COURT: This will come under the same exception as yesterday.

By Mr. TUCKER:

Q. In answering the question, if you say there are any differences, Mr. Kracke, or any changes made, do not state who made the changes or when they were made. Just tell me, now, the differences between that ladder as it existed at the time of this
34 accident and as it is shown by this photograph? A. It shows that the ladder has had an extra support here at the second floor—the second landing.

Q. At what point? A. The second landing.

Q. What I want to know is, what change was there since the accident and since the time that photograph was taken at the point near the rung that you have mentioned? A. Why, it appears here that there has been something cut away here. I cannot see the strip, that one inch rough stuff in here.

Q. Do you mean, now, the strip back of the rung? A. Yes, sir.

Q. Is the strip shown on that photograph? A. No, sir; I don't see it here, sir. I can't see it here.

Q. What is the piece that I indicate now? A. That? That seems to be some studding up there in support of the concrete—that strip.

The WITNESS: In support of the concrete—the concrete from right there—an I-beam there.

Q. Was this strip that I indicate now, as shown by this photograph

on either side of the ladder, present at the time of the accident? A. That is, at the time of the accident was this strip——

Q. Was this strip that I now indicate on either side of the
35 ladder present? A. I don't quite understand you, Mr. Tucker.

Q. You have stated that there was a strip of wood back of the ladder? A. Yes, sir.

Q. In the back of this rung that you have indicated? A. Yes, sir.

Q. Does this photograph show that strip, or any part of that strip? A. No sir. I can't make it out if it does.

The COURT (to the stenographer): All this evidence is under exception.

By Mr. TUCKER:

Q. Look at that photograph again, please. Look at the photograph, now, of the ladder at the second floor, does that correctly represent the situation as it existed at the time of the accident? A. No, sir.

Q. What difference is there? A. There is a reinforcement behind that ladder, braced.

Q. Look for that beam that you speak of that was about four feet, you said, in front of the face of the ladder. Does that picture show it? A. It shows where it is sawed off.

Q. That is, a part of it is shown? A. Yes, sir.

Q. On the picture? A. Yes, sir.

36 Q. You have pointed out three differences that exist. Are there any other differences that exist, according to your best recollection. A. I do not think there is any other, without that ladder was brought away from that concrete form at the top.

Q. I do not believe I understand you clearly about that. A. The way the photograph shows, it still shows that the ladder is close up against that concrete form.

Q. Yes. Was that the condition that existed at the time of the accident? A. The ladder right up against that form?

Q. Yes. A. Yes, sir; but not the concrete itself, because there was a couple of boards behind there, and the ladder was right up against them.

Q. Against the board? A. Yes, sir.

Q. Not against the concrete form? A. No, sir.

Q. Aside from these differences that you have pointed out, do those photographs correctly show the situation with respect to that ladder at the time of the accident No. 1 being the lower part of the ladder, and No. 2 the upper part? A. How is that, Mr. Tucker?

37 (By request, the stenographer read aloud the pending question.)

A. No, sir; the ladder was not the same at the time of the accident.

Q. You misunderstood the question, Mr. Kracke, with respect,

now, to the differences that you pointed out in this ladder, does that ladder correctly show the situation that existed at the time of the accident? A. Yes, sir; yes, sir.

The witness further testified substantially as follows:

That he made daily use of the ladder before the accident, and that there was a swing or vibration to it, especially so when anyone caught hold of it at the top, because the top projected about five or six feet above the top landing and that naturally gave the ladder a vibration in the center just as soon as you grabbed it; witness knows when he grabbed it, it gave a vibration, because witness swung on to it whenever he grabbed it; that the vibration was greatest in the center; that he didn't slip very many times on this rung, because he made a point to stretch a little bit and take the rung below.

The witness testified on Cross-examination substantially as follows:

That the ladder rested on boards placed across the elevator shaft and was toe-nailed at the bottom; (Drawing on blackboard:) This, here, is the top landing. This is the second landing. This is the first floor. This is the side of the ladder, looking at the ladder sideways. That represents one cleat that this inch-by-two strip that you speak of was nailed on. Now, there is the way: These, here, are the cleats. This is a cleat; this is a cleat, and this is the inch-by-two strip that the ladder was nailed on. About there was the top of the cement form that represented a beam. The ladder touched at this point. It was nailed on at this point. The front of that strip is two inches away from this form. Then this ladder was fastened right n to that strip. It rested at this edge, and that brought this rung an inch and a half away from this strip. This strip here was just about three-quarters of an inch or an inch above this rung of the ladder, making that an incline; so when you put your foot on there, your toe hit here; and there was nothing else for you to do but to slip
38 off if you were not very careful. That this strip was longer than the ladder was wide; that the strip was fastened to the concrete form and the ladder fastened to the strip; the strip to which the ladder was nailed was about three feet long and was longer than the ladder was wide; that it was so fastened that it was necessary that a man should step on that rung to descend or ascend; that the strip to which the ladder was fastened projected out from the ladder one inch; that the distance between the rungs was about twelve inches, and that the first rung below the level of the third floor was about ten inches, perhaps a foot; that the cement form may have been eighteen inches, or it may have been two feet deep; that it was a reinforced concrete beam; that there was plenty of room for the ladder to be taken hold of by anyone getting on it at the third floor; that he was standing at the first landing at the time of the accident; that as the man hollered all he had to do was to look up, because it was all open there, and there was no stairway; that when he looked Wilson was in the air falling backwards; that Herbert C. Jones was working in the elevator well above the first landing at the time of the accident and that Mr. Colbert was working with him; that they were about fifteen feet nearer the accident than he was.

And plaintiff further to maintain the issue on his part joined, produced as a witness, JAMES L. BOWEN, who testified substantially as follows:

That he is an inspector of construction in the Bureau of Yards and Docks, in the Navy Department, and is now employed at the Portsmouth Navy Yard, Norfolk; that he was employed as United States Inspector of Construction at the Naval Hospital in February, 1910; that during the construction of the reinforced concrete, he was in the Sick Officer's Quarters very frequently; that he remem-
39 bers the ladder there and that it was a three story ladder; that at the third floor there was a blocking, pieces that tied the ladder to the beam, that was framed closely to the rung; that he used the ladder frequently; that the condition of the rung near the third floor was an obstruction to a certain extent to the foot-hold; that you probably had to go by it cautiously; that it never bothered him; that he noticed it going up the ladder several times, being close to the rung but it never bothered him particularly so far as going up and down the ladder was concerned; that it was an obstruction to the foot; that the rung of the ladder lies in a horizontal position, and if you put your toe on the rung there would be a tendency to hit that little strip of wood.

Q. How did that affect your toe-hold on the ladder or on the rung? A. I can't say it affected my—(the witness did not finish the answer).

On cross-examination witness stated:

That he had gone up and down the ladder very frequently during the progress of his work, and that his work took him to the attic floor frequently.

And plaintiff to further maintain the issue on his part joined, produced as a witness, H. L. ADAMS, who testified substantially as follows:

That he is an inspector in the Norfolk Navy Yard and in February, 1910, was an inspector for the Navy Department in the Sick Officers' Quarters, Naval Hospital, during course of construction; that
40 the ladder from which Mr. Wilson fell was there about three months and that he does not think it was changed materially during that time; that the ladder belonged to the Thompson-Starrett Company; that he had occasion to go up and down the ladder very frequently; that at the top just as you left the ladder there was a one by three, that struck your toe; that as your foot was on the last rung of the ladder, the rung hit the foot just about under the toes, that is, just ahead of the ball of the foot, not getting a good foot-hold, so that it was necessary to hang on very tight at that point; that his attention was attracted by "just ordinary observation"; that in a case like that he always looks out for places that are not entirely convenient to get around; that he does not remember whether the ladder was tied at the second floor before the accident, but thinks it was; that he may have slipped some on that rung; that usually in getting there your foot slips a little, but that he was always cautious enough to have a good hold with his hands as a rule.

On cross-examination the witness testified substantially as follows:
That during the three months the ladder was there (prior to the accident), he went up and down at least once a day, sometimes twice a day or more; that the ladder was very well fastened at the first
41 floor and third floor, and he thinks at the second floor; that there was some shaking of the ladder when you went up and down; that they usually shake some; that he does not recall any more in connection with this ladder than is ordinary in mounting or demounting ladders; that the last rung at the third floor was about eight, nine or ten inches below the surface of the third floor; that the ladder was fastened at the third floor by strips on the inside of the ladder, and also by a piece on each side, holding it from pulling away in going by; that he thinks it was notched in to hold it from pulling out, that is, there was a strip coming around in front of the ladder grooved to hold it back; that the ladder rested on a strip one-by-three that was a part of the concrete floor form; that you could place your foot on the rung just ahead of the ball of the foot, about an inch and three quarters or two inches; that there had been bricklayers and hodcarriers using that ladder, and men going up with boxes or hods of brick on their shoulders; that during the time he was there as inspector, he does not remember of anyone else falling down the ladder but Mr. Wilson; that he never made any complaint to the Thompson-Starrett Company about this ladder being unusual or anything wrong with it.

And plaintiff to further maintain the issues on his part joined, produced as a witness, FRANK WALL, who testified substantially as follows:
That he is a plumber and was employed in February, 1910, at the Sick Officers' Quarters, Naval Hospital; that at the time of the accident he had been working in that particular building about
42 two weeks; that the ladder had been in the same position that it was when Mr. Wilson fell during all the time he had been working there; that the rungs were pretty well worn from using them; that there was a rung at the third floor with a strip right behind it that projected up above the rung of the ladder about half an inch, which gave about an inch toe-hold on the rung; that before Wilson was hurt, he the witness, was nearly thrown to the cellar once in coming down the ladder; that he went to step on the rung and stepped on the strip first; that it happened that he had a good hand hold on the ladder and his foot went right off the rung; that the ladder was not tied at the second floor before the accident to Mr. Wilson; that there was an awful spring to it; that Mr. Somers was the Superintendent and Mr. McNulty came under him; that Mr. Bergmann was there before Mr. McNulty working with tools; that he saw these men using this ladder before Mr. Wilson was hurt; that they came around sometimes, maybe once or twice a day and went up the ladder to look after the men.

On cross-examination witness testified substantially as follows:
That the swaying would start when you would get about three

feet from the ground; that the ladder was braced at the third floor; that it would be the same way when you would start from the top; the minute you got below the third floor the ladder would start to sway; that it could not sway at the third floor because it was leaning against the floor; that it would sway above the third floor, because if you caught hold of it, it would naturally put a swing in the ladder, because the ladder went about five feet above the third floor; that if you have your hands above the floor it would naturally give the ladder a swing; that any ladder would swing some when you took hold of it.

43 And the plaintiff to further maintain the issues on his part joined, produced as a witness, P. J. CORRIGAN, who testified substantially as follows:

That he is an elevator constructor and was employed in the Sick Officers' Quarters in the Naval Hospital grounds when the accident to Mr. Wilson occurred; that he started work around there about the 15th of February, 1910; that the ladder was in the same position when he went there as when Mr. Wilson fell; that he didn't see Mr. Wilson fall; that he had occasion to use that ladder very often before Mr. Wilson was hurt; that there was a kind of a form at the third floor to hold the cement together; that there were two boards, inch by twelve; and these boards were tied together by a piece of wood about an inch by two; that this piece of wood came about an inch or three-quarters of an inch above one of them rounds there; that his attention was drawn to it by his having slipped there one time going up; that it seems to him that his foot did not get the proper bearings; that it was a little below the landing and that when he put his foot down bearing most of his weight on the one foot as he usually does, it kind of gave, and witness struck this inch-by-two piece there and kind of slipped off; that when he slipped he did not fall because he supported himself with his hands; that he was accustomed to climbing and supposed that when he felt the give, he took extra precaution in putting the rest of the strain on his arms and his other foot.

In cross-examination witness testified substantially as follows:

44 That there were a good many men working there; that he went up and down this ladder to the third floor frequently; that the ladder was fastened tight at the third floor by two strips; that there was a spring at the second floor; that it had a bearing on a platform at the first floor; that as you get on the ladder to go up towards the second floor it gave a kind of spring, owing to it not being fastened at the second floor.

And the plaintiff to further maintain the issue on his part joined, produced as a witness, JOSEPH WILLIAMS, who testified substantially as follows:

That he is a plumber, and was working at steamfitting at the Naval Hospital, February, 1910; that he had been working there five days at the time of the accident of Mr. Wilson; that he had an occasion to use the ladder from which Mr. Wilson fell three or four times

before the accident; that at the third floor there was a cement beam which the ladder went against; that the ladder extended five or six feet above the third floor; that there were two twelve inch boards, and at the center of the beam, a strip was nailed across to hold the boards for the cement form; that the rung was about a half or three-quarters of an inch below this strip, and you only had room enough to get about an inch and a half or inch and a quarter toe-hold; that he was warned about the rung by Clark, one of his fellow workmen and so never slipped on it.

45 On cross-examination witness testified substantially as follows:

That there were quite a number of steamfitters working in the building at the time, but does not remember of any carpenters, except Mr. Wilson; that he had not seen Mr. Wilson before the accident; that he had seen a great many people go up and down the ladder to the third floor and had never seen anybody slip.

And the plaintiff to further maintain the issue on his part joined, produced as a witness, RICHARD M. FRY, who testified substantially as follows:

That he was working as a plumber's helper at the Naval Hospital at the time Mr. Wilson was hurt, and had been working at this particular building about three weeks and the ladder had been there during that time; that there was a board behind the first rung you stepped on coming down the ladder from the third floor, so that you could not get a good toe-hold that is a toe-hold of more than an inch or inch and a half; that the ladder was not tied at the second floor and there was a sway to it, but he could not say how much; that if you would get on there with any weight, the ladder would sway to and fro and shake and kind of offset you off your balance; that his balance was affected in going up the ladder with pipe; that when he would get in the middle of the ladder it would sway with you, and you would think you were falling backwards; that he never fell or anything of that sort; that one time when going up there with a piece of two inch pipe, he was afraid to go further than the second floor and handed the pipe to Mr. Wall; that he never slipped on this rung at the third floor.

46 On cross-examination witness testified substantially as follows:

That the swaying would take place about the second floor or below the second floor either way you went on the ladder up or down; that in going up the ladder the swaying would start about two-thirds between the first and second floor-.

And the plaintiff to further maintain the issue on his part joined, testified as follows: his calling is that of a carpenter:

That in February, 1910, he was employed by the Thompson-Starrett Company at the Naval Hospital, and on the 25th day of February was working on the Sick Officers' Quarters; that he had worked about two days and a quarter on the second floor and an hour or thereabouts on the third floor; that he went to work for the Thomp-

son-Starrett Company about the 7th of February; that he started to work on the officers' quarters, and after working on other buildings went to the Sick Officers' Quarters a little over two days before he was hurt; that William Bergmann was the Thompson-Starrett Company's foreman, and that Mr. Somers was Superintendent of the job; that Nolte or McNulty was an under-foreman under Mr. Bergmann; that during the two days he worked on the Sick Officers' Quarters, he worked on the second floor laying sleepers; that before the day he was hurt, he was never on the third floor; that before he was hurt, he had used the ladder to go to the second floor four times a day, going up and coming down at noon, then up again for the evening work; that he never had any occasion to go down between
47 times from the second floor in the daily use of that ladder; that on the day he was hurt, he was left on the second floor alone, to finish the sleepers; that it took him about three-quarters of a day or a little more to finish the sleeper work; that he got through and no one came around to provide him with any work there, so he went hunting some of them, and could not locate anybody, and just stayed there until McNulty came in the neighborhood; that when he hollered to McNulty he came and located witness on the third floor; that McNulty told witness to go to the third floor to lay sleepers; that he went to the third floor right up this ladder and took his tools with him; that the ladder with two of us on there, shook like Old Harry; that McNulty was in the lead, and that he (witness) followed him; that he (witness) was engaged on the third floor about an hour when he was in need of some more tools, and started to get a brace and bit; that he does not remember getting on the ladder; that the next thing he recollects was being in the dark room at the hospital; that his attention was never called by anybody to any dangerous condition of that ladder, and that he did not know of any dangerous condition of the ladder before he was hurt; that when he went up to the third floor the day he was hurt, he did not have any difficulty in using the ladder; that it is usual with him and usual with mechanics, to step from the lower round on to the landing platform, and in doing so, of course he would miss this round which these men speak about; that he does not know anything about the round, but naturally would miss that round in stepping up, by stepping from the lower round of the ladder on to the platform; that he has been a carpenter since his apprenticeship at fifteen years of age; that it was a regular stock ladder; that there is a variation in
48 the stock sizes, but the general run of stock-size ladders—say take a thirty foot ladder—would be made out of about one and three-eighths or one and five-eights material, tapering to about three and a half at the bottom and three inches wide at the top; that in some stock ladders that are made by some manufacturers, the side piece tapers, others do not; that this particular ladder, so far as he knows was a tapering ladder; that he does not know who it was made by, but it was a stock ladder; that the rungs generally run about one and three-eighths in the center tapering off to about three-quarters or seven-eighths of an inch at the sides; that before the accident witness always had excel-

lent health and always had employment when there was any to get; that he now cannot work at his calling; that he tried to put some shelves up at home and his head gave way and he fell; that there are certain sounds he can hear with his left ear but otherwise he cannot hear; that he suffers now a great deal of soreness but no pain; that the cold and wet weather stiffens him up and makes him sore and when his head gets worse, his neck gets stiff and he gets "staggery."

On Cross-examination the witness testified substantially as follows:

That he is sixty-one years of age; that he never worked for the Thompson-Starrett Company before this occasion; that he had been at work in this particular building about two days; that the accident happened on the third day he was there; that having finished his work on the second floor it was possibly three quarters of an hour before he went to the third floor, and he spent that time in looking up a workman or McNulty; that when he went up to the third floor, he started from the first floor, and that Nolte (McNulty) started up ahead of him and he followed on the ladder right behind him; that he saw McNulty go up to the third floor and saw him get off the ladder; that as he (plaintiff) went up to the third floor his head had to pass the place where the rung was below the third
49 floor; that he thought it was a mechanic that put up the ladder and that it was all right; that he gave it no attention whatever; that he does not recall looking at it at all; that when he reached the third floor that day, he is positive that he stepped on the third floor from the rung below the last rung; that the rung he stepped from was about ten or twelve inches below the floor; that Mr. McNulty (Nolte) was up there possibly ten minutes or so, but that he did not notice him go down; that there was plenty of light up there for him (witness); that there was no trouble about seeing that ladder; that he does not know what time it was that he started to go down the ladder, and has no recollection of going down the ladder at all; that he has no recollection of going down or starting to go down the ladder; that the last he remembers there was, putting down a piece of sleeper and being in need of a brace and bit for boring it; that he does not recall making up his mind to go down to get that brace and bit, but all that he knows is, that he was in need of those two pieces of tools, which were on the first floor; that he has been in the habit of going up and down ladders ever since he was fifteen years of age and possibly before that, because his father was a carpenter; that he does not always look to see where he is putting his feet when he starts to go up or down a ladder; that he takes hold to steady himself, but does not recall whether he touched the ladder on this occasion or not; that when he went up the ladder that day with McNulty, McNulty said nothing to him about the way the ladder was fastened or mentioned the ladder in any way; that nobody else was working with him on the third floor at the time of the accident.

50 Mr. TUCKER: I do not think I have formally offered these photographs in evidence.

The COURT: No, you have not offered them.

Mr. TUCKER: I do offer them in evidence now.

Mr. LAMBERT: I object, may it please the Court.

The COURT: I will receive them, of course, as long as the witnesses have been allowed to testify in regard to them; and they will come under the same exception. They will be numbered 1 and 2.

(The above named photographs are marked "Plaintiff's Exhibit No. 1" and "Plaintiff's Exhibit No. 2".)

51 The plaintiff further to maintain the issue on his part joined offered as a witness Dr. RAYMOND SPEAR, who testified substantially as follows:

That on February 25, 1910, he was a surgeon in the United States Navy stationed at the Naval Hospital, Washington, D. C. The sick officers' quarters are part of the hospital, being a building in the hospital grounds about one hundred feet from the hospital. About three o'clock on the last mentioned day, the plaintiff was brought into the hospital and taken to the operating room. He was in an unconscious condition; in a state of coma and covered with blood. His nose was mashed almost flat and there was a large wound running from his eye up into his head and a stream of blood trickling from his left ear. The left side of his face was paralyzed. The dirt had been ground into the bone by the force of his fall; his left collar bone and his left arm were broken and there were numerous bruises and contusions over the leg and body. There was a fracture of the skull involving the bases of the brain, where two nerves come out, one supplying the muscles of the face and the other of which is the nerve of hearing. He was in such a state of coma that he did not require any anæsthetic. In the operation two places in the skull were opened and as a result of the operation remain open. By placing one's finger on the skull over such openings, the brain can now be felt pulsating. His neck was dislocated and as a result he holds his head on one side. He developed pneumonia from the force of the blow on his chest which, however, lasted only a few days and cleared up. His face remained paralyzed for six months. His hearing in the left ear is permanently gone resulting from lesion of the nerve of hearing in that ear.

52 As a result of his injuries he has a marked vertigo. He has lost the power to perform work, having lost his power of equilibrium. If he should endeavor to go on a platform he would fall. One arm as a result of his injuries is an inch smaller than the other. There is a partial loss of sensation on one side and his grip is materially impaired. The witness also produced and they were exhibited to the jury X-ray photographs of the plaintiff's skull and neck showing his injuries. Thirty-five stitches were taken in the skin of the plaintiff's skull at the time of the operation. In the opinion of the witness, the plaintiff was permanently injured and will never be able to resume his calling as it would be unsafe for him to go on a scaffold and as he has only partial use of his left arm. The operation lasted about two hours. The loss of his hearing in the opinion of the witness is permanent.

The plaintiff further to maintain the issues on his part joined called as a witness Dr. CHARLES F. STOKES who testified substantially as follows:

He is Surgeon General of the United States Navy. He had examined the plaintiff and corroborated the testimony of Dr. Spear as to the nature and extent of his injuries. Witness stated that in his opinion the loss of hearing in the left ear of the plaintiff is permanent, and witness was of the opinion that he would not be able to pursue his calling in the future, in that it would be hazardous for him to mount a stepladder because of impairment of the automatic establishment of balance.

The plaintiff further to maintain the issues on his part
53 joined offered as witnesses Drs JOHN W. STEWART and FRANCIS A. ST. CLAIR who testified as to the nature and extent of the plaintiff's injuries and that in their opinion he was permanently injured and would not be able to work at his calling hereafter.

Thereupon the plaintiff further to maintain the issues on his part joined, produced as a witness JOHN H. WILSON, a son of the plaintiff, who testified substantially as follows: that his father was in the hospital about six weeks, after which he got up and tottered around a little while and would go back and lie down and get up and walk around the yard a little while and go back and rest; that his left eye was full of corruption and it was necessary that it be cleansed constantly; that this treatment continued for three or four months; that plaintiff cannot work now at all; that before he was hurt he was a very healthy and energetic man and absolutely tireless and his physical condition was fine and he was able to work at his trade constantly; that after his father left the hospital, witness had to give him electrical treatments and shave him and has shaved him ever since.

The plaintiff then rested his case in chief.

Thereupon the defendant in order to maintain the issue on *his* part joined, produced as a witness F. J. NOLTE (heretofore referred to as McNulty), who testified substantially as follows:

That he is a carpenter and was employed by the Thompson-Starrett Company until they finished all the work they had in Washington; that he was employed by them as assistant foreman at the work at the Naval Hospital; that he was employed there from the time the work started to the time it was finished, about a year; that he was not head foreman of carpenters, but had charge of certain buildings; that Mr. Bergmann was foreman of carpenters,
and he was assistant foreman under him; that at the time
54 of the accident of Mr. Wilson, they were getting ready for plastering, putting down sleepers to nail the floor to, and setting up what we call bucks; that Mr. Wilson was working as a carpenter and had been there about a week or two; that the ladder was fastened at the top floor and bottom, and was perfectly solid;

that it had been travelled up and down for weeks, two or three weeks "before Wilson, or anyone else;" witness had been up there as many as twenty or more times a day; that it was a regular builder's ladder, a stock ladder; not hand made, but a regular substantial ladder; that the witness thinks the uprights were four inches wide; that the rungs were all right; 75 or 80%; that the ladder's condition was 75 to 80%; that it was fastened at the third floor in the ordinary way that they fasten all ladders in buildings, with cleats on each side and hooked back on each side that it was fastened to joists, two by twelve, laying on the concrete floor and these cleats were nailed on to them; that behind the rung of the ladder which was just below the third floor was what we call the header of the stairway; that the rounds were about an inch and a half or two inches away from that; that the uprights were leaning against that piece; that there was plenty of room to get your hands on the rounds going up; that there was plenty of room to get your feet on the rounds; that the last round of the ladder before he got off at the third floor was level and you could get plenty of purchase on it for your foot; that the ladder was better constructed than some he has climbed up on; that the ladder was about eighteen inches out of the perpendicular from the third to the first floor; that they had to put them very straight for the hod-carriers to carry brick up; that the hod-carriers had been carrying the bricks up in hods on their shoulders two or three weeks before that, and that the ladder had been in the same condition all that time, as it was when Mr. Wilson had his accident; that they had been carrying bricks in hods clean to the top of the ladder; that the chimneys were on; that he never heard of any complaint about anything being defective or wrong with the ladder at the third floor; that there was but very little vibration to the ladder; that there was hardly any swaying at the second floor; that there was a brace at the second floor at the time Wilson fell; that at the second floor there was a straight piece fastened to the ladder and braced on the floor, to keep the ladder from swaying any, and a nail to put in it to hold it; that Wilson was working there under him, and witness had just taken him up there an hour or two before that; that when he put him to work up there witness said to him, "can you get along all right by yourself?" to which Wilson replied, "certainly I can get along;" that he, Wilson, carried his tools up there; that he, (witness) had been up there twice while he, Wilson, was up there, and he, Wilson, was getting along all right; before going up to the third floor, he said to Wilson, "can you manage your tools going up there" and Wilson said "oh, that is all right;" that he went up the ladder after Wilson, Wilson going up first; that he (witness) left the drawings up there with him, Wilson, and explained what he, Wilson, was to do and asked him "can you get along all right?", and Wilson said "oh, yes, I can get along all right;" that he, (witness) knew he could do it and that is why he left the drawings with him; that Wilson was the only man working on that particular work, although there may have been someone working out on the roof; that when he (witness) followed Wilson

up the ladder witness thinks he the witness carried a trussel with him to saw lumber on; that he saw Wilson land at the third floor and that he stepped off the top rung, the one that was right
56 level with the floor; that when Wilson was carried to the hospital witness did not go along as he thought there were enough there; that there had been from twenty-five to thirty or forty men working on the job and using the ladder for two or three months it was there; everybody in the building used it; that there had never been any other accident or trouble there so far as he knows in connection with this ladder or any complaint of anything.

On cross-examination the witness testified substantially as follows:

That he was not now in the employ of the defendant, but if it got another job in Washington, he had been told he would be employed by it; that the ladder lacked about eighteen inches of being perpendicular; that the ladder tapered about three or four inches at the top; that the narrower it is, the better it is, because you don't have to spread your arms; that the ladder was braced at the second floor and had been for two weeks or more before the accident; that he did not express regret at having sent Mr. Wilson up that ladder to the third floor; that he felt sorry for the accident to happen because Wilson was an old friend of his; that he knew Wilson for years, but that he did not express regret that he had ordered him up there or had anything to do with it; that after the accident he called some men to take Mr. Wilson to the hospital and went to the door and superintended them; that when there is an accident every Tom, Dick and Harry is talking to you; that all of them has got something to say; that he remembers speaking to Mr. Kracke afterwards; that he (Kracke) kept hollering and all that, and witness told him "For God's sake keep quiet, don't make so much noise, let's look after the man's life first and then talk about matters afterwards;" that after Mr. Wilson had been taken to the hospital he does not remember having talked to Mr. Kracke; that he did not say to him in response to a remark he made "the less you say about the accident the better it will
57 be for you and all hands;" that he did not hear Kracke say "that damned ladder should be fixed or someone else will be killed;" and that he did not say in response "the less you say about the accident the better it will be for you and all hands," but that the only thing he said was "It ain't no use making so much fuss over it. Look after the man's life first;" that he believes he had some talk with Mr. Wilson's son the next day, after the accident, but does not remember what he (witness) said to him; that he was kind of nervous after the accident, and it made him feel bad to see it happen; that he was at the foot of the ladder at the time the accident occurred; that there was a colored laborer named Clayton at the foot of the ladder; that one day he is here and the next day somewhere else, and you could not find him; that there might have been some others, but he did not look around; that Mr. Kracke was somewhere in the elevator shaft above the first floor; that there were about two more men there, but he cannot tell who they were;

that he would not know them from Tom, Dick or Harry; that in the conversation with Mr. Wilson, Jr., the following day, he did not tell them that his father had been on the third floor about twenty minutes before the accident took place; that he thinks that was the first day Wilson was up there, and indeed is almost sure.

And the defendant to further maintain the issue on his part joined, called as a witness, W. H. BERGMANN, who testified substantially as follows:

58 That he is a carpenter and was in charge of the carpenters at the Naval Hospital in February, 1910, and was working there about eight months prior to February, 1910; that he is not now employed by the Thompson-Starrett Company; that the ladder rested on three by twelves, and ran from the first floor to the third floor; that it was a regular stock ladder made of wood; that the ladder was about two feet six inches out of the plumb; that he had been up and down that ladder frequently to the third floor; that there were not very many men working there around the 25th of February; that the hod-carriers used the ladder to carry bricks up to the top for the chimneys; that they carried brick up on their shoulders in hods; that it had been used possibly a month and was in constant use; that so far as he knows, there had never been any trouble or accident, or complaint about the ladder prior to the time Mr. Wilson had the accident; that there was some planking laid on the cement floor at the third floor and the ladder was braced in from there; that it was fastened in the usual manner to fasten such ladders and was strongly fastened at the third floor; that in going up and down the ladder there was very little vibration; that there was a strip back of the ladder at the last rung at the third floor that was about half an inch above the rung; that there was about two inches space between the rung and the strip; that there was sufficient space for a person's hand to hold; in answer to the question "How was it with reference to getting the foot or toe on the rung of the ladder there," the witness replied "Well, I had no trouble with it;" that he never heard anybody else talk of having any trouble; that

59 nobody ever complained to him about it in any way; that the ladder extended above the third floor about six or seven feet, and there was ample space to take hold of the ladder above the third floor; that he does not know any of the men who were working for the elevator people; Mr. Wilson was putting down sleepers on the third floor the day he fell and had been there about an hour; that before that, he was doing some work on the second floor; that he did not see him go up to the third floor, and was not there at the time of the accident; that as to the strength and stability of this ladder, he would say it was perfect.

On Cross-examination the witness testified substantially as follows:

That the toe-hold on the rung just below the third floor was about two inches, and that he had no difficulty himself in coming down; that he is not in the employment of the Thompson-Starrett

Company, and does not expect to be when they get another job here; that there is no reason for this exception.

On Redirect examination witness stated:

That the rungs of the ladder were about ten inches apart; that he does not know of anything projecting out in the wall at the third floor anywhere near the ladder; that he does not know whether the ladder was fastened at the second story.

60 On Cross examination witness stated:

That the sides of the ladder were about four and a half by two inches, and the ladder tapered towards the top; that he never measured the sides of the ladder but the figures given were approximately the size.

And the defendant to further maintain the issue on his part joined, called as a witness, FELIX NOLTE, who testified substantially as follows:

That he is seventeen years old and in February 1910, was employed as a water-boy and general office-boy for the Thompson-Starrett Company, at the Naval Hospital; that he would go around and check the men for the time-keeper and would carry water up the ladder to the men all over the building; that there were men working on the second and third floor and that they went from one floor to the other by means of the ladder; that the ladder was the same as in an ordinary building; that it was fastened on boards at the first floor and fastened with clamps at the third floor, just the same as an ordinary ladder is fastened in a building; that he cannot say how far it was from the perpendicular, but it seemed to him the same as ordinary ladders in such places; that he never noticed any trouble at the third floor as he went up and down; that he went up there at least four or five times, may be 10 or 12 times a day to see the workmen and to carry the water up; that he did not notice any difficulty or trouble or anything unusual as to starting or getting off the rung on the ladder at the third floor; that he came

61 down all right; that in reference to vibration the ladder seemed solid to him; that he does not recall whether it was braced or fastened at the second floor, but knows it was fastened at the third floor, the same as ladders are ordinarily fastened in a building construction; that he never heard anybody complain of any difficulty in going up and down the ladder or any trouble at the third floor; that he had been working on the job about two months at the time the accident happened; that he never heard of anybody else slipping, stumbling or falling on this ladder; that he knew Mr. Wilson just from seeing him on the job; that he had seen him on the third floor a couple of times, but he is not sure whether it was morning or afternoon; that he does not know whether he saw Mr. Wilson that day or not; that he was not there at the time of the accident, and that they had taken him away before he reached there.

On cross-examination the witness testified substantially as follows:

That he is not sure whether he saw Mr. Wilson on the day of the accident or not; that he could not say for sure whether he had ever seen him on the third floor; but thinks he was there on the day he

was hurt in the afternoon or morning; that on the day of the accident he (witness) had been up on the third floor some time in the morning and some in the evening; that at the time of the accident he (witness) was over at the Female Nurses Quarters, at the opposite side of the grounds; that this was after lunch; that he had
62 not been at the Sick Officers' Quarters that afternoon before Mr. Wilson fell; that he could not say whether he carried water in the sick Officers' Quarters that day or not, but knows that he went up there with messages, to check the men up; that he knows he had been up there days before and days afterwads with water; that this was his first employment on construction of a building; that he can get a recommendation from the defendant any day and has reason to expect that he will be employed by it again.

The defendant here rested this case in chief.

And thereupon the plaintiff in rebuttal recalled as a witness, CHARLES KRACKE, who testified substantially as follows:

By Mr. MACFARLAND:

Q. Mr. Kracke, immediately after the accident to Mr. Wilson did you have a conversation with Mr. Frank Nolte? A. Not immediately afterwards.

Q. Immediately after the return from the hospital? A. Yes, sir.

Q. Was it a very brief time after the accident? A. Well, it was not with Mr. Nolte in particular. Mr. Nolte and several others were standing at the foot of the ladder at the time.
63 Q. Yes. A. Do you want me to use the same words that I used there?

Q. Yes.

Mr. LAMBERT: May it please the Court, I object to this.

The COURT: Mr. Macfarland will have to ask this witness whether he said what he asked the other witness.

Mr. LAMBERT: Then I want an opportunity to make my objection.

The COURT: Are you objecting to the form of the question?

Mr. LAMBERT: At present I am objecting to the form.

The COURT: He will have to put it in leading form, if you desire it that way. You have your election, as I understand, to have him put it in leading form.

Mr. LAMBERT: I think it ought to be in concrete form, because I want to object to that.

The COURT: What is the other objection?

Mr. LAMBERT: My other objection is that even if put in concrete form, it would not be proper evidence; it would be something alleged to have taken place some time after the occurrence; that it could not be considered as part of the res gestæ, and that it is a collateral matter in connection with which the defendant cannot be affected, and that the counsel for the plaintiff are bound by the answer of a witness in connection with a collateral matter.

The COURT: Let me see the record. I wish to see just what
64 it was that you asked. (After examining record:) I see the force of your objection, Mr. Lambert; but I am inclined to think that if he said that, the jury might infer from it that he had not been stating the truth with regard to the condition of the ladder and what he knew about it.

Mr. LAMBERT: Of course I have one other suggestion, and that is that I do not think they have laid sufficient foundation for asking the question. But that would come in connection with the propounding of the question, I suppose.

The COURT: Is Mr. Nolte here?

Mr. LAMBERT: I think so.

The COURT: It might be fair to recall him and ask him specifically about this. I think, though, that the question as put before assumed that others were there. It was not a conversation between this Mr. Kracke and this Mr. Nolte alone.

Mr. MACFARLAND: That was expressly stated.

The COURT: His attention ought to be called to the exact circumstances, of course, at the time.

Mr. LAMBERT: Yes. The record here apparently assumes that this alleged conversation took place immediately after the accident.

The COURT: I understood it to be immediately after the return from the hospital.

Mr. MACFARLAND: Yes; that it is. (Reading from page 196:)

"Q. After Mr. Wilson had been taken to the hospital, do you remember talking to Mr. Kracke? A. I don't remem-
65 ber that.

Q. Do you not remember that you said to him"? etc.

The COURT: If there is any point to the effect that he was not sufficiently informed that others were by, and that the conversation was somewhat general, then Mr. Nolte may be recalled so that there may not be any doubt about that.

Mr. LAMBERT: So far as the question of others being by is concerned, I make no point about that.

The COURT: Very well. Then I think I will admit this, and note an exception for you, Mr. Lambert. You will have to ask the same question in the same form; you can put it in a leading form, Mr. Macfarland.

By Mr. MACFARLAND:

Q. Did you say, on that occasion "That damned ladder should be fixed, or somebody else will get killed?" A. Yes sir.

Q. Did Mr. Nolte then say to you, or did he say——

The COURT: In reply to that.

By Mr. MACFARLAND:

Q. (Continuing:) In reply to that, in response to that: "The less you say about the accident, the better it will be for you and all hands." A. Yes sir.

The witnesses further stated that the ladder was not fastened at the second floor at the time of the accident.

66 On cross examination witness testified that on the occasion when this conversation was held, after the return from the hospital, there were two laborers and Mr. Colbert, Mr. Corrigan and Mr. Jones and Mr. McNulty.

And the plaintiff in rebuttal recalled to the stand, WILLIAM A. COLBERT, who testified on Direct examination as follows:

By Mr. MACFARLAND:

Q. Mr. Colbert, you were present at this moment when Mr. Kracke made the remark which he made, and Mr. Nolte made the reply which he made? A. Yes, sir.

Mr. LAMBERT: May it please the Court, this goes under my same exception.

The COURT: Yes; it will be under the same exception. You do not care to have it repeated?

Mr. LAMBERT: I do not want to repeat it.

By the COURT:

Q. You heard what Mr. Kracke just testified to? A. Yes, sir.
Q. You say that is true, do you? A. Yes, sir.

Mr. MACFARLAND: That is all I desire to ask.

The testimony on both sides was announced closed.

67 And thereupon the Justice presiding, at the request of the counsel for the plaintiff granted and gave to the jury the following instructions.

I.

The jury are instructed that if they find from the evidence that the ladder in question was furnished by the defendant for the use of its employees, including the plaintiff, and that it was so fixed or placed in position that at or near the third story of the building under construction at the time the plaintiff was injured one of its rungs afforded unsafe, insecure and dangerous foothold to such of defendant's employees, including the plaintiff, as might be required to use the ladder, and that it was not braced or tied at the point where it passed the second story of the building, and that
68 such omission to so brace or tie it at such point would cause it to swing or vibrate dangerously when used, and if they shall further find that the defendant knew, or if it had exercised reasonable care and caution would have known, that the use of the ladder so fixed or placed was dangerous to its employees using it for the purpose of their work, and that the plaintiff while in the act of descending or attempting to descend the ladder, lost his footing either by reason of the foothold so afforded by said rung, or by reason of the swinging or vibration of the ladder, or by reason of

both of said causes, and fell therefrom and was injured, and if they shall further find that the plaintiff in his use of the ladder on the occasion in question was using reasonable care, then their verdict should be for the plaintiff.

II.

The jury are instructed that if the defendant claims that the plaintiff was guilty of negligence which contributed to his injury, the burden is upon it to prove it. The jury are, however, entitled to consider all of the evidence—that for the plaintiff as well as that for the defendant—in determining whether the plaintiff was guilty of such negligence; but such negligence must be established, if at all, by a preponderance of evidence.

III.

The jury are instructed that it was the duty of the defendant to furnish for the use of its employees, including the plaintiff,
69 reasonably safe means and appliances for their use in ascending to and descending from the several floors of the buildings it had under construction; and that if the defendant furnished the ladder in question for such purpose, fixed in its position, the plaintiff had the right to assume that the ladder was so fixed and placed in position that it was reasonably safe for his use unless it was so fixed or placed in position that the plaintiff knew the defective condition or unless the same was plainly observed by him.

IV.

The jury are instructed that if they find for the plaintiff, in estimating the damages to be awarded him, they may take into consideration the physical pain undergone by the plaintiff as a result of the injury inflicted and the mental suffering attendant thereupon; together with such future suffering as will necessarily result from such injury; and also the time lost by the plaintiff from his ordinary employment as a result of such injury, and the impairment if any of his earning capacity taking into consideration his age and condition in life; and they should also consider the expense and obligations he has incurred for medical and surgical treatment so far as the same are reasonable.

And to the granting of the first and third of said prayers for instruction, when and as the same were offered, the defendant by its counsel, then and there duly excepted.

70 And thereupon counsel for the defendant prayed the Court to give to the jury the instructions following:

I.

The jury are instructed as matter of law that upon the pleadings, and all the evidence in this case, their verdict must be for the defendant.

II.

The jury are instructed that before the plaintiff can recover, they must find from the evidence adduced in the case that it was the duty of the defendant to furnish, for the use of the plaintiff and defendant's other employés, a ladder so fixed and placed in position as to be reasonably safe; and if they cannot so find from the evidence adduced that such was the defendant's duty, then their verdict must be for the defendant.

III.

The jury are instructed that before there can be any recovery of damages by the palintiff in this case, he must prove by the evidence adduced in the case that the defendant fixed or placed or caused to be fixed or placed in position the ladder referred to in this case for the use of the plaintiff and its other employés; and if the plaintiff fails to establish this fact, then their verdict must be for the defendant.

71

IV.

The jury are instructed that there is no evidence in this case establishing, or tending to establish, that the plaintiff, when attempting to descend the ladder mentioned herein, lost his footing by reason of the swinging or vibration of said ladder, or by reason of said swinging or vibration in conjunction with the alleged negligent condition of said ladder by reason of the fact that it was placed at the third floor landing of said building, as in the declaration claimed, and therefore, they cannot find for the plaintiff on either of said grounds.

V.

The jury are instructed as matter of law that before they can find a verdict in favor of the plaintiff the latter must establish by a preponderance, of the evidence negligence on the part of the defendant. In building operations where men are employed absolute safety is unattainable, and employers are not insurers; employers are liable for the consequences, not of danger, but of negligence, and the unbending test of negligence in placing ladders into position for use, is the ordinary usage of the trade. However strongly the jury may be convinced that there was a better or less dangerous way to place this ladder into position, they cannot be permitted to say that the usual and ordinary way commonly adopted by those in the same trade is a negligent way for which liability shall be imposed. The jury are therefore instructed that before they can find for the plaintiff

72 in this case they must find not only that there was actually a defective and dangerous condition present at the time the plaintiff was injured, but that the defendant failed to use and exercise the care and prudence ordinarily used and exercised by others in the same trade, in erecting this ladder; provided, however, the jury does not further find that the plaintiff was guilty of contributory negligence when using this ladder, or assumed the risk incident to its use.

VI.

The jury are instructed that if the alleged defective condition of the ladder was so patent as to be plainly observable by the plaintiff, he is presumed to have had knowledge of that condition; and if, under such circumstances, he used the ladder and was injured, then your verdict must be for the defendant.

And thereupon the Justice presiding rejected I, II, III, IV, and V of said prayers and granted VI; that exceptions were duly noted by defendant's counsel to the Court's refusal to give its prayers numbered I, II, III, IV and V as aforesaid.

And thereupon, and after said exceptions had been duly noted, the Justice presiding gave to the jury his general charge in the following terms:

The COURT (Mr. Justice STAFFORD): Gentlemen of the jury you understand the case so thoroughly after this argument that it seems almost a waste of time for me to say anything about it. The
73 principal rules of the law that apply to the case have been settled by the Court and read to you, and I think they substantially cover the case. It is possible that just a few simple words by the Court may help you to deal with the case as the law intends you should, and I will spend but very few minutes with you over it.

There are some things that are perfectly established in the case. No argument is made about them. One is that Mr. Wilson was at work for the Thompson-Starrett Company. The company was the employer. He was the employee. He was at work for it on the day when this accident occurred. The undisputed evidence is that he went up this ladder by the direction of his employer, because the man who told him to go up there represented the Thompson-Starrett Company to him. He had to do what he told him to do, within reason. So that at the very moment when the plaintiff was using this ladder, he was on the business of and in the work of the company. I suppose there is no question in anybody's mind, upon this evidence, that he went down that ladder on some errand connected with his business. I mean, he started to go down it.

Now, what was the legal duty of the defendant company toward him with respect to that ladder? The law says it was the duty of the company to use reasonable care and caution in providing him a safe way to descend by. Not that it was absolutely bound to make it safe, as it should turn out, but that it should use reasonable care and caution in order to make it safe.

This declaration alleges that the ladder was unsafe in two particulars, and that the accident was occasioned by one or the other
74 or both of them together. The first is that the strip of board so often alluded to here was placed so close behind one rung of the ladder where it was fastened to the third floor that there was an unsafe foot-hold for one descending the ladder. The other is that by reason of a failure to fasten the ladder at the second story the ladder had an undue vibration.

Now, the first question is: Did those defects, or either of them

exist? What, exactly, was the condition of the ladder in those two respects? Was the board at the third story placed behind this rung in such close proximity to it that it made that an unsafe rung to use when one attempted to descend the ladder? As to the other point, was the ladder attached at the second story or was it not? If it was not attached, did that give it an undue vibration?

Now, if those defects did exist, do you say that they were proof of negligence on the part of the employer? The employer was bound to use reasonable care and caution to make that a safe way to go down. If those two things existed and they were defects (I mean if they were defects in your judgment) was the presence of those defects proof to your mind of want of reasonable care and caution on the part of the employer? If you find that it was through a want of reasonable care and caution on the employer's part that those defects existed in the ladder then that point of the plaintiff's case is established. If the defects, or either of them did exist, did Mr. Wilson know of them? Or, if he did not know of them, was he careless in not knowing of them? He had a right to rely upon the legal duty of the master which I have just stated, and unless there was something to call his attention to a defect there, he had the right to assume that the ladder was sufficient. You have heard the evidence as to what opportunity he had to discern either or both of these defects if they existed. Did he know about them, or ought he to have known about them in the circumstances? If he knew about them or ought to have known about them in the circumstances, why then if he used the ladder in his ordinary work he would assume the risk. That would be the ordinary rule as to workmen.

75

Assuming for the moment, then, that the defect was there, that it was through the negligence of the company that it was there, and that Mr. Wilson did not know of it and ought not to have known of it in the exercise of reasonable care on his part, then did the defect, one or both, cause this accident? Was it due to the defective rung or to the want of attachment of the ladder at the second story, or to both together, and so due to the negligence of the defendant? That is the question. That is what the plaintiff has to make out by a fair balance of the testimony.

Now, here comes in this doctrine of contributory negligence. If the evidence when you take it all together fairly shows that Wilson himself was negligent he cannot recover even though you should be convinced that the defendant company was negligent. If the accident was due in part to negligence on Wilson's side, then he cannot recover. In order for him to recover the case made out must be one in which the accident was due to the negligence of the defendant company, and not in any degree to the contributory negligence of the plaintiff.

76

Now, gentlemen, I think that is a fair summary of the law as to the rule of negligence, the duty of the master to the servant, and the servant's duty to the master, and with the instructions that have been read in your hearing I think, perhaps,

it presents all that you need to have said to you of the law touching the case. Is there any particular point, Mr. Lambert, that you desire to have me speak of more fully?

Mr. LAMBERT: I have made some notes with reference to exceptions that I desire to note when your Honor is through.

The COURT: Is there any subject that you would like to have me speak of more fully?

Mr. LAMBERT: I think your Honor touched on the question of the preponderance of the evidence, did you not? I think you did.

The COURT: Yes; of course the plaintiff must make out his case by a fair balance of the testimony, as I have told you in all these cases.

Mr. LAMBERT: May it please the Court, I desire to note an exception to so much of your Honor's charge as instructs the jury that it was the duty of the defendant to use reasonable care and caution to provide a safe way to get down from this floor; and I also wish to note an exception to so much of your Honor's charge as permits the jury to consider the question of vibration of the ladder, or its non-attachment at the second floor. I might, to be perfectly fair, suggest to your Honor, in that connection, that my recollection is that the plaintiff himself testified that he knew it was not attached at the second floor. Your Honor in your charge instructed
77 the jury that he could not avail himself of something that he knew with reference to a condition.

The COURT: I will say a word about that, as Mr. Lambert calls my attention to it. As I recollect the plaintiff's testimony on that point it was that as he went up the ladder with two men on it, it did shake like the old Harry, to use his exact expression. When he was coming down, he was coming down alone, so far as the evidence shows. That fact should be considered, probably, in connection with his statement. On the other hand, he was up there, and he had to come down some way if he ever came down. There was no other way provided for him to come down. So I do not know, really, what he could have done if he had not come down on the ladder.

Mr. LAMBERT: But your Honor missed, I think, the suggestion I had in mind, which was that his testimony was that he had been working on the second floor for two days and had gone up and down that ladder, and had gotten off of it at the second floor, so that he necessarily knew the conditions with reference to whether or not there was an attachment there at the second floor.

The COURT: The record can be examined if that is important. I do not understand that Mr. Wilson said anything about the ladder shaking except on the occasion when the two went up together.

Mr. LAMBERT: I am speaking with reference to the attachment at the second floor.

The COURT: I know it; but I do not recall that he said anything about the ladder shaking anywhere except that he said it did shake in this way when they went upon it together. If he said it
78 shook at other times when he went up to the second story, and that he knew that condition——

Mr. LAMBERT: I think the record shows that.

The COURT: Then the jury should keep that in mind. They will remember about that. If the accident was due entirely to the vibration of the ladder would you claim to recover, Mr. Tucker?

Mr. TUCKER: That is not my theory of the case at all, if the Court please. I have not considered it at all. It simply occurred to me that the vibration might be an inducing cause taken in connection with the other cause.

The COURT: Would you claim to recover, as you think of it now, if there was no defect with reference to the rung?

Mr. TUCKER: No, no; I do not see how we could.

The COURT: Then perhaps it would be well to let the jury understand that.

Mr. TUCKER (to the jury): Let me repeat, gentlemen, once more, about that vibration, as the charge in the declaration is one for which I am responsible. My only idea about that, and all that I present on behalf of Mr. Wilson, is that if when he put his foot on that rung there was any swing or sway of that ladder it might possibly have caused him to lose his foot-hold quicker than if there had not been a sway or vibration. That is all I contend for, and the only thing I am arguing for; and that is what the prayer that was granted is directed to.

Mr. LAMBERT: That is different, of course, from the line in which the instruction submits it to the jury, I think.

79 The COURT: I think the jury ought to understand, then, distinctly, that the recovery is to be had only for a defect in the rung, or a defect as to the rung assisted by the vibration of the ladder.

Mr. TUCKER: Your Honor has expressed it exactly. We are willing to take our stand on that position.

The COURT: The jury will so understand it, then.

Mr. LAMBERT: To that revision in the statement of the Court I would like to note an exception.

The COURT: An exception will be noted to that.

Mr. LAMBERT: And to so much of your Honor's charge as stated that the plaintiff had a right to rely on this legal duty as defined, and to assume that the ladder was sufficient if his attention was not called to it.

The COURT: Yes; I do not care to modify that part of the charge.

Mr. LAMBERT: We do not have to renew our exceptions as to the prayers now, do we?

The COURT: I do not think you do; but I have a minute of your exception as to each instruction.

Mr. LAMBERT: I understand that there was some question about whether or not we had to renew them.

80 And thereupon, and before the jury retired to consider their verdict, counsel for the defendant then and there prayed the Justice presiding to sign and seal this, its bill of exceptions,

which is done, now for then, this twenty-third day of January, 1912.

By the Court:

WENDELL P. STAFFORD, *Justice.*

O. K.

SLEMAN & LERCH.

TUCKER, KENYON AND MACFARLAND.

81 Filed January 25, 1912.

In the Supreme Court of the District of Columbia.

At Law. No. 52570.

JOHN D. WILSON, Plaintiff,

vs.

THOMPSON-STARRETT COMPANY, a Corporation, Defendant.

Assignment of Errors.

The errors of the trial court asserted by the appellant and intended to be argued on appeal are as follows:

1. That the Court erred in admitting in evidence the two photographs identified by the witness John Haupt as having been taken by him from one to two weeks atfer the accident.

2. That the Court erred in permitting the plaintiff to prove by the testimony of the witnesses Herbert C. Jones and Charles Kracke that the two photographs of the ladder in question identified by the witness John Haupt as having been taken by him from one to two weeks after the accident, show that the alleged negligent conditions had been removed and corrected shortly after the accident.

3. That the Court erred in permitting the plaintiff to show that the alleged negligent conditions were removed and corrected after the accident.

4. That the Court erred in permitting the plaintiff to show by the witnesses Herbert C. Jones and Charles Kracke that the two pictures of the ladder in question, identified by the witness John
82 Haupt as having been taken by him from one to two weeks after the accident, correctly represent the position of the ladder at the time of the accident, with certain changes, indicated by the witnesses in their testimony.

5. That the Court erred in permitting the plaintiff to show, for any purpose, by the testimony of the witnesses Charles Kracke and William A. Colbert on rebuttal, that the witness Kracke, after the accident and after his return from the hospital, said in the presence of the witness Nolte, "That damned ladder should be fixed or somebody else will get killed" and that Nolte said in reply to that "The less you say about that accident the better it will be for you and all hands." The witness Nolte was asked on cross examination if Kracke did not make this remark on the occasion mentioned and

answered that he did not hear him make the remark. Nolte also denied that he made in reply the remark attributed to him.

The admission of these alleged declarations is objected to

First. Because they were not proper rebuttal testimony.

Second. Because the declarations were not part of the res gestae or in the nature of admissions binding upon the defendant.

Third. Because the testimony was offered by the plaintiff for the purpose of proving the incompetent declarations.

Fourth. Because even had proof of the declarations been offered for the purpose of contradicting the witness Nolte and thus to impeach his credibility, they were not competent for that purpose as they concern a collateral and incompetent matter, and not contradictory of anything stated by the witness on his examination
83 in chief, and the plaintiff is bound by the answer of the witness on cross examination and cannot contradict him upon such collateral matter.

Fifth. Because even had they been admitted by the Court for the purpose of impeaching the credibility of the witness Nolte, it was the duty of the Court, sua sponte to charge the jury that the declarations could be considered only for impeachment purposes and not as substantive evidence in the case.

6. The Court erred in instructing the jury at the request of plaintiff, as follows:

The jury are instructed that if they find from the evidence that the ladder in question was furnished by the defendant for the use of its employees, including the plaintiff, and that it was so fixed or placed in position that at or near the third story of the building under construction at the time the plaintiff was injured one of its rungs afforded unsafe, insecure and dangerous foothold to such of defendant's employees, including the plaintiff, as might be required to use the ladder, and that it was not braced or tied at the point where it passed the second story of the building, and that such omission to so brace or tie it at such point would cause it to swing or vibrate dangerously when used, and if they shall further find that the defendant knew, or if it had exercised reasonable care and caution would have known, that the use of the ladder so fixed or placed was dangerous to its employees using it for the purpose of their work, and that the plaintiff while in the act of descending or attempting to descend the ladder, lost his footing either by reason of the foothold so afforded by said rung, or by reason of the swinging or vibration of the ladder, or by reason of both of said causes, and fell therefrom and was injured, and if they shall further find that the plaintiff in his use of the ladder on the occasion in question was using reasonable care, then their verdict should be for the plaintiff.

7. The Court erred in instructing the jury at the request of plaintiff as follows:

The jury are instructed that it was the duty of the defendant to furnish for the use of its employees, including the plaintiff, reasonably safe means and appliances for their use in ascending to and descending from the several floors of the buildings it had under

construction; and that if the defendant furnished the ladder in question for such purpose, fixed it in its position, the plaintiff had the right to assume that the ladder was so fixed and placed in position that it was reasonably safe for his use unless it was so
84 fixed or placed in position that the plaintiff knew the defective condition or unless the same was plainly observable by him.

8. The Court erred in refusing to instruct the jury to bring in a verdict for the defendant as requested by defendant's first prayer.

9. The Court erred in refusing to instruct the jury at the request of the defendant as follows: (Defendant's second prayer.)

The jury are instructed that before the plaintiff can recover, they must find from the evidence adduced in the case that it was the duty of the defendant to furnish, for the use of the plaintiff and defendant's other employés, a ladder so fixed and placed in position as to be reasonably safe; and if they cannot so find from the evidence adduced that such was the defendant's duty, then their verdict must be for the defendant.

10. The Court erred in refusing to instruct the jury at the request of the defendant as follows: (Defendant's third prayer)

The jury are instructed that before there can be any recovery of damages by the plaintiff in this case, he must prove by the evidence adduced in the case that the defendant fixed or placed or caused to be fixed or placed in position the ladder referred to in this case for the use of the plaintiff and its other employés; and if the plaintiff fails to establish this fact, then their verdict must be for the defendant.

11. The Court erred in refusing to instruct the jury at the request of the defendant as follows: (Defendant's fourth prayer.)

The jury are instructed that there is no evidence in this case establishing, or tending to establish, that the plaintiff, when attempting to descend the ladder mentioned herein, lost his footing by reason of the swinging or vibration of said ladder, or by reason of said swinging or vibration in conjunction with the alleged negligent condition of said ladder by reason of the fact that it was placed at the third floor landing of said building, as in the declaration claimed, and therefore, they cannot find for the plaintiff on either of said grounds.

85 12. The Court erred in refusing to instruct the jury at the request of the defendant as follows: (Defendant's fifth prayer.)

The jury are instructed as matter of law that before they can find a verdict in favor of the plaintiff the latter must establish by a preponderance of the evidence negligence on the part of the defendant. In building operations where men are employed, absolute s*fa*ety is unattainable, and employers are not insurers; employers are liable for the consequences, not of danger, but of negligence, and the unbending test of negligence in placing ladders into position for use, is the ordinary usage of the trade. However strongly the jury may be convinced that there was a better or less dangerous way to place this ladder into position, they cannot be permitted to say

that the usual and ordinary way commonly adopted by those in the same trade is a negligent way for which liability shall be imposed. The jury are therefore instructed that before they can find for the plaintiff in this case they must find not only that there was actually a defective and dangerous condition present at the time the plaintiff was injured, but that the defendant failed to use and exercise the care and prudence ordinarily used and exercised by others in the same trade, in erecting this ladder; provided, however, the jury does not further find that the plaintiff was guilty of contributory negligence when using this ladder, or assumed the risk incident to its use.

13. That the Court erred in instructing the jury in his general charge that it was the duty of the defendant to use reasonable care and caution to provide a safe way to get down from this floor.

14. That the Court erred in instructing the jury in his general charge that recovery is to be had only for a defect as to the rung or a defect as to the rung assisted by the vibration of the ladder.

15. That the Court erred in instructing the jury in his general charge that the plaintiff had a right to rely on this legal duty as defined, and to assume that the ladder was sufficient if his attention was not called to it.

SLEMAN & LERCH,
Attorneys for Appellant.

86 *Designation of Record.*

Filed December 8, 1911.

* * * * * * *

The Clerk will please prepare a transcript of record upon appeal of defendant which hereby describes as the necessary papers thereto the following:

1. Declaration.
2. Motion to strike out first count of declaration.
3. Demurrer to second count of declaration.
4. Order overruling motion to strike out.
5. Order overruling demurrer.
6. Defendant's plea.
7. Memorandum of joinder of issue.
8. Memorandum of verdict.
9. Judgment on verdict.
10. Bill of Exceptions.
11. Memorandum of defendant's appeal to the Court of Appeals.
12. Memorandum of bond on appeal.
13. Assignment of Errors.

SLEMAN & LERCH,
W. J. LAMBERT,
Attorneys for Defendant.

87 Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA,
District of Columbia, ss:

I, John R. Young, Clerk of the Supreme Court of the District of Columbia, hereby certify the foregoing pages numbered from 1 to 86, both inclusive, to be a true and correct transcript of record, according to directions of counsel herein filed, copy of which is made part of this transcript, in cause No. 52570 at Law, wherein John D. Wilson is Plaintiff and Thompson-Starrett Company, a corporation is Defendant, as the same remains upon the files and of record in said Court.

In testimony whereof, I hereunto subscribe my name and affix the seal of said Court, at the City of Washington, in said District, this 13th day of February, 1912.

[Seal Supreme Court of the District of Columbia.]

JOHN R. YOUNG, *Clerk.*

Endorsed on cover: District of Columbia Supreme Court. No. 2392. Thompson-Starrett Co., &c., appellant, vs. John D. Wilson. Court of Appeals, District of Columbia. Filed Feb. 14, 1912. Henry W. Hodges, clerk.

COURT OF APPEALS
DISTRICT OF COLUMBIA
FILED
APR. 22-1912
Henry W. Hodges
Clerk.

COURT OF APPEALS DISTRICT OF COLUMBIA

APRIL TERM, 1912.

No. 2392.

THOMPSON-STARRETT COMPANY, APPELLANT.
A Corporation.

vs.

JOHN D. WILSON, APPELLEE.

BRIEF FOR APPELLANT.

PAUL SLEMAN,
HARRY F. LERCH,
Attorneys for Appellant.

WALTER L. CLARK,
Of Counsel.

THE CRANE CO.

IN THE

Court of Appeals of the District of Columbia

April Term, 1912.

No. 2392

—o—

THOMPSON-STARRETT COMPANY, a Corporation,

Appellant,

vs.

JOHN D. WILSON,

Appellee.

—o—

BRIEF FOR APPELLANT

—o—

STATEMENT OF THE CASE

This is an action by John D. Wilson, whereby he seeks to recover damages for injuries received by him while in the employ of the Thompson-Starrett Company, (the Appellant) as a carpenter, on February 25th, 1910. The declaration, in its two counts, charges that it was necessary for the appellee in the performance of his duties as an employee of the appellant to use a ladder as a means of ascent and descent from one floor to another in one of the

partially completed buildings being constructed by the appellant for the United States Government, known as the "Naval Hospital Buildings" there being no other means of ascent or descent to the different floors of the building. Appellee, in his declaration, alleges "that *it then and there became the duty* of the defendant (appellant) to furnish to the plaintiff (appellee) and its other employees while they were so engaged in the performance of their duty as aforesaid, for his and their use as aforesaid, a ladder which should *be so fixed and placed in position as to be reasonably safe;*" that the appellant failed in its duty in that it *negligently and carelessly fixed or placed, or caused to be fixed or placed in position* a thirty foot ladder stretching from the first to the third floors, not braced or tied at the second floor, such omission causing vibration or swinging, and that such ladder was fixed or braced at the third floor in such a way that the step or rung at the third floor afforded an unsafe or insufficient foothold. (The evidence discloses that back of the step or rung of the ladder at the third floor there was a piece of board to which the ladder was nailed, which was about 2 inches back of the rung and was either about level with it or projected slightly above it.) Appellee alleges that by reason of the vibration, or by reason of the unsafe foot-hold afforded, or by reason of both of said causes he lost his footing and fell to the basement floor of the building, thereby suffering serious and permanent injuries.

The appellant demurred to the second count of the declaration and moved to strike out the first count. (R. pp. 4 and 5). The court below overruled the demurrer and overruled the motion to strike out the first count, to which the appellant duly excepted. (R. p. 5)

The appellant filed its plea of general issue, and the case was duly tried before a jury. The jury brought in

a verdict for the plaintiff As we are only contending for the 8th assignment of error (R. p. 44) we will state the evidence as briefly as possible and only to the extent necessary to properly present the case under this assignment of error.

The appellee by his own testimony and that of his witnesses proved that he went to work for the appellant at the Naval Hospital Grounds February 7, 1910, and after working on other buildings there was directed to work on the Sick Officers Quarters a little over two days before he was hurt, on the second floor laying sleepers; that he used to go up the ladder in question to the second floor four times a day; that after finishing his work on the second floor he was told by McNulty (Nolte), who was the assistant foreman of carpenters, to go to the third floor; that Nolte went with witness up the ladder to the third floor; "that the ladder with two of us on there, shook like old Harry;" that appellee worked on the third floor for about an hour and attempted to descend the ladder, as he states, for the purpose of getting some tools. As to how he fell, appellee remembers nothing. (R p. 25)

Appellee has been a carpenter since he was fifteen years of age; is now sixty-one; the ladder was a regular stock ladder, "that this particular ladder, so far as he knows was a tapering ladder; that he does not know by whom it was made, but it was a stock ladder; (R. p. 25); *that he thought it was a mechanic that put up the ladder* and that it was all right." Appellee (R. p. 25) refers to stock sizes of ladders and says: "but the general run of stock-size ladders—say take a thirty foot ladder, etc."

There is no evidence of any kind produced by the plaintiff to show that the ladder broke, nor is there any evidence of the ladder itself being unusual either as to length, finish, or construction and there is no evidence or claim of unsoundness. *There is no evidence whatever*

produced by appellee to show who placed this ladder in position.

It is admitted by plaintiff that the ladder was substantially braced, in the usual manner, at its base where it rested on the first floor, and securely tied to the third floor by cleats, but the complaint is that by reason of the proximity of the top rung to the strip back of it an insufficient and insecure foot-hold was afforded on that rung, and further that the ladder vibrated because it was not tied or braced at the second floor. It is to be noted that the plaintiff, in his own testimony, admits that he used this ladder to and from the second floor for several days before the accident happened. The evidence offered by the plaintiff also shows that the alleged obstruction back of the top round of the ladder was plainly observable. H. L. Adams, a witness for plaintiff testified (R. p. 21) that his attention was attracted to the obstruction by "just ordinary observation." Herbert C. Jones, another witness for the plaintiff testified (R. p. 14) "that you could see it if you looked at it;" Charles Kracke another witness for plaintiff, testified (P. p. 17) that you could see the cleat by looking down at it from the top landing about to descend the ladder. James L. Bowen, another witness for plaintiff, noticed it going up the ladder several times (R. p. 21). Jones also testified (R. p. 14) "that the accident occurred between three and four o'clock in the afternoon, and it was a very bright sunshiny day; that there was plenty of light; that anybody could see without any difficulty anything around; that the third floor was lighter than the second." Colbert another witness for plaintiff testified (R. p. 16) that between the third floor and roof there was nothing at all and that there was no difficulty in seeing everything around there on the third floor that day. The plaintiff testified (R. p. 26) "that as he went up to the third floor

his head had to pass the place where the rung was below the third floor; that he thought it was a mechanic that put up the ladder and that it was all right; that he gave it no attention whatever; that he does not recall looking at it at all; that when he reached the third floor that day, he is positive that he stepped on the third floor from the rung below the last rung; that there was plenty of light up there for him; that there was no trouble about seeing that ladder."

The appellee produced witnesses whose evidence tends to show that appellee started to descend the ladder and that by reason of the obstacle in the rear of one of the rungs near the third floor, coupled with the swinging or vibration of the ladder he lost his footing and fell and sustained serious injuries.

There is however not a syllable of evidence in the record that the plaintiff's foot struck this obstruction as he started to descend the ladder.

ASSIGNMENT OF ERROR

The Court erred in refusing to instruct the jury to return a verdict for the appellant as requested by its first prayer, which reads: (R. p. 36)

> "The jury are instructed as a matter of law that upon the pleadings, and all the evidence in this case, their verdict must be for the defendant."

ARGUMENT

By the abandonment of the assignments of error except the one set forth above this case is reduced to a very narrow compass. Should the court below have instruct-

ed the jury to return a verdict for the defendant upon the pleadings and evidence in this case? We submit that such could have been the only proper action of the court.

It will be remembered that in the first count of the declaration the appellee charged that it was the duty of the appellant, as employer of the appellee, to furnish a ladder "which should be so *fixed and placed in position as to be reasonably safe.*" In the second count he does not include the above, but alleges that a ladder such as has been described, was furnished, and that "said ladder had been so negligently and carelessly fixed or placed in position *by said defendant*" that it afforded an unsafe means of ascent and descent. As to these two counts our position is that plaintiff charges a custom which, as a matter of fact does not exist, when he alleges that it was the positive duty of the appellant to furnish a ladder fixed or placed in position. He does not offer a syllable of evidence to prove such a custom. The law imposes no such burden upon appellant, and upon what theory appellee could be permitted to recover under his first count is not apparent. As to the charge that appellant *fixed or placed the ladder* contained in the second count appellee offers not a word of proof. He closed his case without showing by a word of testimony who fixed or placed the ladder. This was a matter in issue under our general denial. How then, can the appellee recover under his second count?

In considering this case it should be borne in mind that this was a large building operation, seven or more buildings being in course of construction;—laborers, bricklayers, stone-masons, carpenters being employed upon different buildings which were in various stages of incompletion. This particular ladder had been used by the hod-carriers and masons whose work had to be done before the carpenters. The use of a ladder by hod-carriers

bearing their loads was attended with much greater risk than its ordinary use by carpenters and others. James L. Bowen, a witness for plaintiff, testified (Record p. 21) that he used the ladder frequently and knew of the condition of the rung at the third floor but it never bothered him. H. L. Adams, another witness for plaintiff, who was the government inspector on the work testified (R. p. 22) that he remembered about the strip back of the ladder at the third floor; that there had been bricklayers and hod carriers using that ladder and men going up with boxes or hods of brick on their shoulders; that during the time he was there as inspector, he does not remember of anyone else falling down the ladder but Mr. Wilson; that he never made any complaint to the Thompson-Starrett Company about this ladder being unusual or anything wrong with it. The defendant furnished this ladder and it was a good ladder,—a regular stock ladder in good condition. There is not a word of criticism of the ladder itself; no claim that it broke, but only criticism of the manner of bracing, fixing or placing of the ladder, which fixing or placing was done by plaintiff or his fellow-servants. Because of the negligence in fixing or placing the ladder plaintiff claims he was injured and seeks to recover.

A LADDER IS A TOOL FOR PERFORMING WORK.

This seems to be the statement of an anomaly but nevertheless the proposition seems to be well settled;—a ladder is a *tool*, and not a *place* to work. The court below seemed to take the view that because there was a third floor to this building; that because plaintiff was directed to work on the third floor; and because he had to use this ladder to get that floor, there existed a situation which imposed upon defendant the positive duty

to provide the ladder fixed in position as a safe "*place*" for the use of plaintiff and his co-servants. In this we think the Court below clearly erred.

For their use the master is required to furnish proper material and tools (sound ladders) and competent co-servants. We submit he has done both. It was the duty of plaintiff and his fellow servants to raise their own scaffolds, place and replace their own ladders, provide temporary staging, etc, etc.

"A ladder is a *tool.*" Bailey-Master and Servant, 2nd Edition, Sec. 197.

In the case of Sheridan v. Gorham Mfg. Co., 66 Atl. 576, it was said:

> "It has been repeatedly held that an ordinary ladder, such as was used in the case at bar, is to be classed with other ordinary "hand tools" and so that the servant using a ladder in the course of his usual employment is chargeable, equally with the master, with knowledge of its obvious imperfections."
>
> See also,
>
> Cahill v. Hilton, 106 N. Y. 512.
> McKay v. Hand, 168 Mass. 270.
> Jenney Electric Light Co. v. Murphy, 115 Ind. 566
> Meador v. Lake Shore R. R. Co., 138 Ind. 290.

In the case of Borden v. Daisy Roller Mill Co., 74 N. W. 92, the court said:

> "It is quite clear from the evidence that plaintiff paid no attention whatever to the ladder before using it. * * * If it was defective as claimed, the defect was open and obvious, with the exercise of the slightest attention; if it was negligence to furnish a ladder for use in and about the mill, with such defects, then it was negligence on plafntiff's part to use it without discovering a condition which was ascertainable by ordinary attention to the

> instrumentalities in use. The principles applicable to this case are well established in the law of negligence, as shown by numerous authorities cited in Holt v. Railroad Co. *supra*. For such application to facts somewhat similar to these, Cahill v. Hilton, 106 N. Y. 512, 13 N. E. 339, cited by appellant's counsel, is a valuable precedent. As said there by Chief Justice Ruger, *a ladder, like a spade or hoe, is an implement of simple structure, intelligible in all its parts to the dullest intellect. How strongly this applies to an experienced employe, required to use ladders constantly about his work."*

THE DUTY OF ADJUSTING THE LADDER IN PLACE WAS THAT OF THE PLAINTIFF AND HIS CO-SERVANTS.

There is a sharp distinction to be drawn between the furnishing of proper tools by a master to his servant, and the use by the servant of the tools furnished. It was undoubtedly the duty of the master in this case to furnish his servants for use in the construction of these various buildings with sound tools (ladders). This it did. No fault is found with the ladder furnished. The criticism is in respect to its use. We submit that the duty of adjusting the ladder in place was that of the plaintiff and his co-servants.

This seems to be the statement of a well settled principle of law. The doctrine is well established by the great weight of authority as stated in the leading case of Quinn v. Fish, 26 New York Supplement, page 10 where it is said:

> "In itself, we repeat, the ladder was sufficient for its purpose, and its insecure fastening was the defect that caused the plaintiff's injury. But to adjust the ladder in place for use was a detail in the execution of their work which it was the duty of plaintiff and his co-servants to perform.

Cregan v. Marston, 126 N. Y., 568, 27 N. E., 952, p. 953.
Arnold v. President, 125 N. Y., 15, 25 N. E., 1064.
Geoghegan v. Steamship Co., 22 N. Y. Supp., 749.

The result is that in dismissing the complaint the learned trial Judge committed no error."

Again the principle is stated directly and in a way indicating there is no doubt as to the point in Maher v. McGrath, 58 N. J. Law 470, 472:

> "For an injury received by one workman from the negligence of others in increasing the scaffolds height, the employer would be no more liable than he would be for the fall of a ladder furnished by him to his workmen, when the fall was the result of one of them negligently placing it insecurely."

It is to be noted in connection with the discussion of this branch of the case that the record contains not a scintilla of evidence as to who placed this ladder in its position. If the case at bar was one involving a scaffold erected as a place to work, and the record showed that the master had furnished suitable material and competent fellow servants, and was silent on the question as to who in fact constructed the scaffold, could it be argued that the master was liable if the scaffold fell. Would it not be necessary to show that the master undertook to furnish the scaffold as a completed structure in order to charge him with liability?

In the case of Kimmer v. Weber, 151 N. Y., 417, 421, it was said:

> "When a gang of masons are engaged in plastering or painting a room, the construction of proper platforms or places upon which to stand

> while doing the work is a detail of the business that is generally left to the men themselves. The master may, it is true, take this out of their hands, and assume to do it himself, and in that case he would be bound to furnish an appliance reasonably safe and suitable for the purpose."

And in the case of Connor v. Pioneer Co. (C. C.) 29 Fed., 629 Justice Brewer when a circuit judge charged a jury:

> "That, if the defendant had furnished the material, etc., and left with tilers generally the duty of preparing their own platforms, and this platform, so prepared, was defective, that was the negligence of the employees, and the employer would not be liable, while, on the other hand, if the employer had employed special individuals,—Mr. Simpson and his assistant—to attend to the work of preparing a platform that was reasonably safe, their negligence was the negligence of the defendant, and the company would be responsible."

It was not shown in the court below that the master undertook to furnish or did furnish this ladder fixed in its place, and we submit that this failure of proof is fatal to plaintiff's case.

The plaintiff failed to introduce any evidence as to who placed the ladder in position. We don't know who put the ladder there. Ordinarily it would be placed there by plaintiff's fellow workmen in the ordinary progress of their work. Is the court and jury to be permitted to conjecture upon this point. The failure of the plaintiff to prove that the defendant undertook to place and did place the ladder must be taken as conclusive against him. Unless the defendant did undertake to place the ladder it cannot be held liable in this case as the fellow servant

doctrine would intervene and deny recovery. Undoubtedly the master owed a duty in the circumstances of this case to furnish a good ladder in order that his servants might ascend and descend from one story to another in the performance of their duties. This it did. To say that it is the duty of a master, as a matter of law, in the construction of large buildings, to personally superintend the placing of every ladder as their placing and replacing are required from day to day, and from hour to hour, as the building progresses is, it seems to us, absurd on its face. If however he undertakes any such onerous duties, the law charges him with the consequences of negligence in the performance of that duty, but not otherwise.

THE PLAINTIFF ASSUMED THE RISK INCIDENT TO THE USE OF THE LADDER.

It is a general rule of law that an employe assumes the risk of all obvious dangers. The evidence seems to be undisputed that plaintiff could have seen the alleged defective condition had he looked. He was as close to the obstruction as anyone was, for his head and eyes came within a few inches of it. It has been held repeatedly that the employe assumes the risks that are readily discernible.

Crawford v. Amer. Steel and Wire Co., 123 Fed. 280.
M. K. & T. Ry. Co. v. Wilhoyt, 160 Fed. 444.
Butler v. Frazee, 211 U. S. 459.
Schlemmer v. Buffalo R. R. Co., 220 U. S. 590.
Skinner Adm. v. Central R. R. Co., 73 Vt. 336.
Holloran v. Union Iron & F. Co., 133 Mo. 470.

Donnelly v. Brown Hun. (N. Y.) 470.
Utah Cons. Mining Co. v. Bateman, 176 Fed. 63.

This is especially the rule with regard to the use of ladders:

Duncan v. Gernet Bros., (Ky.) 87 S.W. 763.
Brady v. Norcross (Mass.) 52 N. E. 528.
Sheridan v. Gorham Mfg. Co., Supra.
Wood v. Heiges, 83 Md., 257.
Joyce v. Flannigan, 111 Md., 481.
Hoar v. Merritt, 29 N. W. 15.

In the case of Borden v. Daisy Roller Mill Co., 74 N. W. 92 (*supra*) it was said:

"It is further assigned as error that the court refused to direct a verdict for defendant, and to set aside the verdict as against the evidence. There was no question in the case as to the plaintiff's being an experienced workman in the use of ladders on floors in mills; no dispute but that he had as good an opportunity as defendant for knowing of the defects in the ladder, if any existed, and all the probable consequences that might follow; no dispute but that he might, by an instant's inspection of the ladder, have found out its exact condition; no dispute but that he selected the ladder and used it without any sufficient, or really any inspection in regard to its being furnished with points to prevent its slipping on the floor; in that state of the case, under the well settled rule that an employe is chargeable with knowledge of all the dangers that are apparent to such observation as men of ordinary care, under the circumstances of the situation, would be likely to make, and the duty to guard himself against injury therefrom, (Jones v. Sutherland, 91 Wis., 587, 65 N. W.,

496), and that if by reason of such dangers, he is injured, he is remediless by reason of his contributory fault,—the plaintiff clearly assumed the risk of using the ladder in the condition it was." Powell v. Steel Co. (Wis.) 73 N. W., 573."

In the case of Marsh v. Chickering, 101 N. Y. 398 401 it was said:

"Even if it may be considered that a right of action exists in this case in favor of the plaintiff, under any circumstances, we think that the evidence would not justify a recovery for the reason that the defendants did not fail in furnishing a proper ladder for the use of the plaintiff in lighting lamps. The rule is that the master does not owe to his servants the duty to furnish the best known or conceivable appliances; he is simply required to furnish such as are reasonably safe and suitable, such as a prudent man would furnish if his own life were exposed to the danger that would result from unsuitable or unsafe appliances. (Burke v. Witherbee, 98 N. Y., 562, Sheam & Refd. on Negligence, par. 92). The defendants had procured a ladder which ordinarily would be regarded as safe for the purpose of which it was used. The plaintiff had used it for a long time without any accident or danger, and on the very night of the accident it had been placed in a position and used several times successfully. That it failed at last for any reason does not establish that it was unfit for use. It might, perhaps, have been more perfect if it had had hooks and spikes, but this improvement was not absolutely essential to relieve the defendants from liability. It was enough that it was reasonably safe and suitable within the rule cited, and under such circumstances an action will not lie."

In the case of Fitzsimmons v. A. J. Cesery & Co. 55 Southern, 465 it was said:

> "Where a master has discharged all his duties to an employee, at common law, the servant assumes all risks incident to the employment."

The court, in considering this question of assumption of risk will remember that the burden of proof is upon the plaintiff and it is not such an affirmative defense as to shift the burden of the proceeeding to the defendant.

Chicago v. Wagner, 46 N. E., 76.

The doctrine of assumption of risk applies not only to risks existing at the time of the employment, but those which arise during the service.

St. Louis Cordage Co. v. Miller, 126 Fed. 495.
Norfolk v. Hight, 76 N. W. 566.
Johnson v. Devoe Co., 41 Atl. 936.
Ragoon v. Toledo, 56 N. W. 612.

It follows as a conclusion then that the plaintiff must be held to have assumed the risk of such an obvious defect as the one here complained of and there is not open to him the contention that he did not see the condition of this rung for he was an experienced mechanic who has spent over 40 years of his life as a carpenter and has been climbing up and down and placing ladders since his early youth. It is not disputed that the ladder was sound, nor is it disputed that the alleged defective condition was obvious and in a well lighted open position. To make the defendant liable for injuries resulting from an accident under such circumstances seems to make it an insurer of the safety of all employees upon the work.

The only way plaintiff could avoid the application of this doctrine would be put upon the theory that some duty of inspection is cast upon defendant by law. We are un-

able to find any case which throws such a burden upon defendant under the circumstances of this case. A master may, in some instances, be held for failure to keep tools and appliances in fit condition; but never where he has discharged his positive duty by providing a sound tool or appliance and thereafter the servants place or use such tools or appliances negligently to their own injury.

On the other hand the law is as stated directly in Dessecker v. Phoenix Mills Co., 98 Minn., 439, 108 N. W. 516. The effect of the ruling in that case is,—where an ordinary ladder furnished by the master to his servant with which to perform his duties is sound and in good condition for use when so furnished, no duty thereafter rests upon the master to inspect the same from time to time for the purpose of ascertaining whether, from its ordinary use, it has become out of repair,—at least as to a servant who is thoroughly familiar with such an instrumentality, and who is injured in the use thereof.

In Collins vs. Danforth, 36 Appeals, D. C., 598, 599, this Court said:

> But it is insisted by counsel for plaintiff that the accident occurred as the result of the negligent act of defendant's foreman in ordering plaintiff and his associates to carry the pipes across the scaffold without first inspecting it to determine as to its safety, and that, inasmuch as the foreman was in charge of the work, defendant is responsible for the act of the foreman. If defendant had erected the scaffold, or it had been erected under its supervision or direction, a different case would be presented. But it must be remembered that it was no part of defendant's duty to the steam fitters to erect the scaffold, and defendant assumed no responsibility in the premises. When the foreman directed the steam fitters and their helpers to carry the pipes across the scaffold, he had a right to assume that they

had satisfied themselves of its safety. *He was under no obligation to inspect it for them.* It was their appliance, not his or defendant's. Responsibility for the acts of the foreman in relation to his fellow servants can only be imputed to the master when the foreman properly represents the master in carrying out the legal or contractual obligations which the master owes to his servants. When acting in that capacity, the foreman becomes a servant. While it is the duty of the foreman to generally superintend the work and give directions as to how it shall be performed, he can do nothing in the absence of authority from the master, or outside of the duty which the master owes to his servants, that will shift responsibility from the servants to the master. Within these limitations he can give no direction to the fellow servants that will enlarge the master's responsibility to them. The master is liable for the negligence of the foreman only when he is performing the duties which the master owes to his servants; in other matters the foreman, in his relation to the servants, is not a vice-principal, but a fellow servant."

There seems to be little or no difference of opinion in the decisions upon this question and on principle it would seem to be sound.

So far as the vibration is concerned, the plaintiff could readily see that the ladder was not tied at the second floor. The fact is, that he used the ladder for three or four days in going to and from the first and second floors.

THE MASTER IS NOT LIABLE FOR THE NEGLIGENCE OF PLAINTIFF'S FELLOW SERVANTS, IF ANY, IN PLACING THE LADDER IN POSITION.

We may admit that defendant was required to furnish a suitable ladder for plaintiff, and his co-servants. This

is a positive duty resting upon the master, but when performed, he is absolved of further responsibility as to the use of the same by his servants. If there is a negligent use of it, a careless or insecure fastening, such negligence is not, in law, the master's. It is that of plaintiff's fellow servant unless the master assumes to place or secure the ladder, which would present a different case. But here the master did not assume to place or secure the ladder, and the record is silent upon the subject as to who placed the ladder. The only conclusion to be drawn is that plaintiff would not introduce evidence upon the subject as he would have shown clearly the application of the fellow-servant doctrine.

It seems to be well settled that employees engaged in erecting a building are fellow servants.

26 Cyc., 1348.
Armour v. Hahn, 111 U. S., 313.
Kerr v. Hess, 98 Fed. 59.
Guggenheim v. Flanagan, 41 Atl. 844.
Collins v. Danforth Co., 36 App. D. C., 599.

Upon the question of the full performance of the master's entire duty by furnishing a proper and safe ladder the case of Donnelly v. Brown, 43 Hun. (N. Y.) 471 is instructive:

> "The only trouble was the insecure place for the foot of the ladder. This was a danger incident to the employment, and was therefore, a risk which must be assumed by the employees. (Gibson v. Erie, R. R. Co., 63 N. Y., 452.) The master had done his duty. There is no complaint of the materials or of the capacity of the fellow employees. If the fellow employees were guilty of neglect, then the law is well settled that no action will lie against the master. (Crispin v. Babbitt, 81 N. Y. 516; New Bauer v. N. P. L. Erie & W. R. R., 101 607). The case shows

> that it is admitted by the plaintiff "that the system and the method of the scaffolding, and the appliances adopted and in use by the defendants at the time of the accident to the deceased, was a good and proper system. The only basis for the action, therefore, is the neglect of the retiring shift to remove the stones before the ladder was placed. It was not a neglect giving a right of action against the master, if such removal should have been made. (Malone v. Hathaway, 64 N. Y. 5)"

In the above case the statement of facts shows that it was customary for the relieving men to construct a scaffold. The bottom of this scaffolding was a ladder with its foot upon the loose rock. The ladder was sound and the planking good and well laid.

THE PLAINTIFF WAS GUILTY OF CONTRIBUTORY NEGLIGENCE.

Manifestly an employe, and especially one who is working on a building in course of construction, cannot shut his eyes to visible defects. He is bound to use ordinary care for his own protection. This rule is so elementary as to require no authorities. Would any court be warranted in saying that the plaintiff should not have known of the condition of this ladder? The cross-examination shows that his head was within several inches of this place as he climbed up the ladder. He was an experienced man in this line of work and knew that the ladder was all that stood between him and a fall of three stories. Can he be heard to say that he did not look at the rungs of the ladder as he went up? There is no evidence that he was in a hurry, as was suggested by the witness Jones, who himself testified that you could see the condition if you looked at it (record page 14). There is evidence to show that there was plenty of light (pages 13 and 16)

and that you could see the cleat by looking down at it from the top (page 17). A photograph was taken of it, and everyone about the building seems to have known of it, with the possible exception of Wilson. Bowen noticed it going up the ladder several times (page 21). The witness Adams said his attention was attracted to it by "ordinary observation" (page 21). There must have been plenty of light there, for the witness Jones says his attention was attracted to the accident by the shadow cast by the plaintiff as he got on the ladder.

If all these things are true, then does the plaintiff exonerate himself from contributory negligence when he makes the bare statement that he did not see it? Does not the law require him to observe things that are plainly visible, or plainly observable? Of course it may be argued that this was for the jury, but where the evidence seems to be clear, and where no one says that the cleat was not plainly observable, unless a man was in a hurry (of which there is no evidence in the present case) it would certainly appear that there is nothing for the jury on which to speculate.

See Duncan v. Gernet Bros. 87 S. W., 763.

There being no positive duty upon the master to fix this ladder in position, the plaintiff is bound to exercise ordinary care in its use and cannot relieve himself from that duty because the ladder was fixed in place when he came to work on the building or because he was ordered to go up to the third floor by the subforeman of carpenters.

The theory of plaintiff's case seems to be,

First: that it was the positive duty of the defendant to furnish this ladder *fixed and placed in its position*, and that the plaintiff had a right to rely upon the proper per-

formance of this duty and was not required to examine the ladder before using it unless put upon notice as to any danger or defects.

Second: that if such dangers or defects, were known to the defendant it was the duty of the defendant to warn the plaintiff of such dangers or defects before ordering the plaintiff upon the ladder.

We think we have already sufficiently answered the first of these two propositions. The plaintiff apparently contends that this positive duty is to be inferred or implied from the circumstances of the case; that because there was no other way to get from the first to the third floor except by using this ladder, the defendant was bound to not only furnish a sound ladder but was bound to personally superintend the placing of it. This inference or implication is relied upon as sufficient to create the positive duty to fix and place the ladder, notwithstanding the fact that no evidence was offered to show either that the master undertook to so fix and place the ladder or that it was even customary in cases of this kind for the master rather than the servants themselves to fix and place ladders for their own use. The evidence shows, as a matter of fact, that the ladder was securely braced both at the top and bottom, and the negligence alleged consists in the location of the ladder so that the top rung was within about two inches of the cleat back of it. We submit that the master, as a matter of law, was not obligated to place this ladder in position and as a matter of fact he did not. If he furnished a sound ladder long enough to answer the required purpose his duty was performed. If plaintiff or his fellow servants, in the location and use of such ladders, create dangerous conditions, the master is not liable.

The language of this Court in Schneider v. American Bridge Co., 31 Appeals, D. C., 420, 426, in an opinion

by the Chief Justice is directly applicable to the situation here involved. The Court said:

> "How the board came to be lying on the beams, or by whom, or for what purpose, it was laid there, does not appear. For aught that appears, the boards mentioned in the evidence may have been brought and laid by some of the workmen engaged in the building, for their own convenience and of their own motion, or may have been surplus boards left over from the scaffold construction."

Adapting the language of this case to the case at bar we say that for aught that appears this ladder was fixed and placed in its position by plaintiff or his fellow servants and we submit that there being no showing that the master did fix or place the ladder in position or that it was customary for the master to do so in cases of this kind, that there is not a sufficient showing on behalf of the plaintiff to support a verdict.

To support the second part of this proposition it is apparently contended that Nolte, the sub-foreman of carpenters, who was immediately over the plaintiff and who directed him to go to the third floor to do some work there, and who knew of the obstruction at the top rung of the ladder, was a vice-principal and not a fellow servant, and as such vice-principal owed a duty to the plaintiff to warn him of the alleged condition.

The question has been directly considered and answered by the opinion in Kiffin v. Wendt, 57 N. Y. Supp. 109:

> "A foreman knowing of the existence of a ladder placed upon a roof as a temporary contrivance for a special purpose is a fellow servant with an employee whom he directs to assist in going up-

on the roof to adjust a collar to a recently erected smoke stack."

We might cite a large number of additional authorities sustaining the last proposition suggested but the decisions quoted from state both the general law and involve facts as nearly like those involved in the instant case that further citation would seem to be entirely unnecessary.

IT WAS THE DUTY OF THE COURT TO DIRECT A VERDICT FOR THE DEFENDANT IN THIS CASE.

As to the duty of the Court in a case where there is an obvious failure of proof of negligence chargeable to the master the well known cases cited below show that upon such facts as are presented by this record there could be no alternative.

Hines v. Spencer, 167 Fed., 267.
Butler v. Frazee, 211 U. S., 466.

It will be recalled that plaintiff specified in two counts the alleged negligence of the master. First that it was the master's duty to furnish a safe ladder, *securely* and *safely* placed; and second, that the master undertook to and *placed* the ladder in an unsafe way. As to the first proposition our answer is that it is a statement of the legal proposition upon which plaintiff rested his case which is not supported by any authority. Or if not construed in that light, it is an allegation of a special custom in this jurisdiction, differing from the custom elsewhere upon which custom elsewhere the authorities state the conclusion of law applicable. If this be true, where is the necessary proof of such custom? There is not a

word of it in the record. How has the plaintiff sustained the burden of proof resting upon him (See Phoenix Bridge Co. v. Castleberry 131 Fed. 175, 180). The second proposition is that the master undertook to and did place the ladder in its alleged unsafe condition. Certainly this is an allegation of a material fact which plaintiff must prove and establish by a preponderance of the evidence. *Where is there any such proof?* If the foregoing correctly states the plaintiff's position in his declaration the court had no discretion in the matter;—his duty to direct the verdict became absolute. The eminent Justice who graced the bench of this Court for many years laid down the rule as reported in the case of Merchants & Miners Transp. Co. v. State of Maryland, etc., 108 Maryland p. 567 as follows:

> In the leading case of State vs. Malster, 57 Md. 309, Judge Alvey in delivering the opinion of the Court, thus lays down the rule. It is incumbent upon the plaintiff to show affirmatively all the elements of the right to recover. Unless the Court can see that there is such evidence in the cause as will fairly support a verdict if the jury should find it to be creditable and proper to be made the basis of their finding, it becomes an imperative duty of the Court to instruct the jury to find their verdict for the defendant. Conjecture or irrational speculation by the jury, as to conclusions of fact, should not be allowed, and unless there be such proof as would justify a deduction of a rational conclusion as to the existence of the essential facts to entitle the plaintiff to recover, the instruction should be for the defendant. Otherwise there would be no certainty attained and often the grossest injustice would be inflicted, in the trial by jury."

Also, in the case of County Comms. v. Sarah A. Wise, 75 Md., p. 38 pp. 41 to 43, it is said:

In cases like this the burden is on the plaintiff to prove that the defendant has been guilty of negligence, and that such negligence has occasioned the injury. If his evidence fails to establish either of these propositions that burden has not been gratified. Hence, when the proof of the plaintiff shows that the negligence upon which the action is founded is attributable to some one else other than the defendant, or, whilst proving the injury, fails to connect the defendant with the cause of it, the plaintiff must be non-suited, and it is equally obvious that where the evidence of the plaintiff is evenly balanced as to whether the cause for which the defendant is responsible, or the cause for which he is not responsible, produced the injury, the jury would have no right to disregard arbitrarily the proof which exculpated, and to credit only that which inculpated—to adopt the theory which would mulct the defendant in damages and to reject that which would exonerate him. Thus in Smith vs. First Nat'l Bank in Westfield, 99 Mass. 605, where a bank was sued in tort for the value of securities intrusted to it for safe-keeping, and alleged to have been lost by negligence, the proof showed that the bailment was a gratuitous one; that the bank used the same care with respect to the bonds that it had used with regard to its own funds and securities, and the plaintiff's evidence failed to exclude the possibility of loss by other means than the asserted negligence of the defendant. It failed to exclude the possibility of the bonds having been stolen without the negligence of the defendant, by any of the persons who had access to the vault where the securities were kept. The loss was absolutely certain, but the cause of the loss, under the proof, might have been either—first, negligence of the defendant, for which it would have been responsible, or secondly, some other circumstance unmixed with negligence, such as theft for instance, for which—that being a case of gratui-

tous bailment—the bank would not have been responsible. In this condition of the proof the Court said: "There is strictly no evidence to warrant a jury in finding that the loss was occasioned by negligence, and not by theft. When the evidence tends equally to sustain either of two inconsistent propositions, neither of them can be said to have been established by legitimate proof. A verdict in favor of the party bound to maintain one of those propositions against the other is necessarily wrong." And so in Midland Railway Co. vs. Bromley 17 C. B., 372 and in Cotton vs. Wood, 8 C. B., (N. S.) 572.

Upon the conclusion of the testimony the defendants asked the Court to instruct the jury among other things that there was no evidence in the case legally sufficient to entitle the plaintiff to recover." This prayer was refused and the defendants have appealed from this and other rulings. The prayer was a demurrer to the evidence and raised the question of the right of the plaintiff to recover, assuming all the evidence offered by her to be true. For the reasons we have given, the prayer, in our opinion, ought to have been granted. Had the first count not been in the declaration, and had no proof been offered by the plaintiff to sustain that count, there would have been sufficient evidence under the second count standing alone, to have gone to the jury on the question of negligence. Or, had the plaintiff confined her case to the second count, and had the defendants relied by way of defense upon the facts which tended to show that the injury resulted from the cutting of the ties of the dam, it would have been the province of the jury to determine which of these two opposite causes, the one asserted by the plaintiff, or the other relied on by the defendants, produced the damage. But the case was not presented in that way by the plaintiff. As actually presented, it showed a case devoid of legally sufficient evidence to con-

> vict the defendants of negligence causing the injury sues for, and should, therefore, have been withdrawn from the jury."

These statements of the law applicable to such a situation seem to be conclusive of the question involved here. We can hardly add words to the statement of the law as set forth above, and we think a careful consideration of the facts will demonstrate its applicability to this case.

Another point which should have been considered controlling in the ruling of the Court below upon defendant's first requested instruction is that there is no evidence to show that the accident occurred as result of the alleged negligent condition caused by the manner of placing the ladder. We will admit, *arguendo,* that there was a board in close proximity to the round or rung of the ladder as result of which persons were prevented from placing their foot on the rung or round for more than an inch and a half or two inches; and for the purposes of this argument we may also admit that it was proven that this was a negligent condition of which the master had, or should have had knowledge; but there is no connection between this condition and the accident, proved by the appellee. We can find no evidence in the record that the appellee's foot was prevented from securing a firm foot hold on the rung by reason of this obstruction; nor is there any evidence that his foot ever touched the obstruction. The witness Jones, the only eye witness to the accident, did not and could not testify that Wilson's foot ever touched the obstruction. The statement of Jones is, that "as Wilson caught hold of the rung his toe slipped and down he came, etc." On page 12 of the record he says that he saw Mr. Wilson's foot touch that *rung* and

on page 13 that he saw him just as he put his foot on that *rung*. Of course there is, by this testimony, a connection between this rung and the accident, but there is no evidence to show Wilson did not secure a foot-hold upon the rung; on the other hand, the positive evidence of the only eye witness is that his foot slipped off the rung. To all appearances his foot would have slipped off the rung, whether or not there had been an obstruction there. Manifestly the burden of proof being upon the plaintiff, the connection between the *obstruction* and the accident must be shown. Many men have slipped from many ladders, and a great multitude of adjudicated cases in the law books will show there were no obstructions. Wilson recalled nothing of the occurrence and the testimony shows that while men have slipped there, men have also gone by many times without difficulty. Can the Court assume that he slipped from the rung because of the obstruction, when the testimony does not show that his foot came in contact with the obstruction? Unless the Court can so assume, the case would seem to fall in that multitude of cases where proof has failed.

M. & M. Transportation Co. v. Hazelton, 108 Md., 564.
County Commissioners v. Wise, 75 Md., 38.

There is certainly no presumption that the defect caused the accident. This being part of plaintiff's case the burden is upon him to prove it. See cases above cited. Also:

Baltimore v. Schmitker, 84 Md., 44.
Kaufman v. B. & O., 24 Md., 85.
Nugent's Case, 86 Md., 360.
Yeager's Admr. v. Receivers, 88 Fed. 775.
Collins v. Danforth Co., 36 Appeals, D. C., 592.

There is another feature of this case which is illumined by the decision of this Court in Collins v. Danforth Co., (*supra*). Counsel for the appellee and the Court below seemed to find some sort of a distinction between this ladder as it would ordinarily be used, and the ladder as it was placed in its position. It is clear that when the defendant furnished ladders they were for such proper use by the servants there employed as the exigencies of the work might require. Among other things the access and egress to different floors of an incomplete building by ladder were contemplated by both master and servant in the contract of employment. To render such access possible the master furnished ladders. The *use* of the ladders devolved upon plaintiff and his fellow servants and in order that they might reach the third floor of this building the ladder was placed by some one of them. Counsel for appellee and the Court below seemed to take the position that because it was necessary that appellee go from one floor to another to perform his duties, that the ladders should be considered as a "way" or "bridge," and that there was upon the appellant the positive duty to furnish a safe "way" or "bridge."

The reverse of this contention seems to have been made in the case of Collins vs. Danforth Company, where Collins sought to avoid the application of the familiar doctrine urged by us in the preceding pages. This Court speaking by the Chief Justice, answered that contention directly. We quote from page 597 of Volume 36 of the Reports of this Court:

> "Counsel for plaintiff attempt to distinguish this case by treating the scaffold as a place for the workmen to stand on while adjusting pipes

> across the corridor instead of a place to cross upon from one side of the corridor to the other. It was used for both, but the evidence is undisputed that it was used by workmen as a foot passage from one side of the corridor to the other, over which materials were carried. The distinction, however, is not important, since the structure was regarded by the steam fitters as a necessity in performing their work."

An examination of the record will disclose that the plaintiff throughout the trial of the case in the Court below had the benefit of the most liberal rulings of the Court and was permitted to introduce in evidence many matters which, we think, were clearly incompetent. We suggest this fact as argument to the Court that he must have produced all of the evidence which was obtainable and the record does not disclose as we recall it, a single exception in favor of the plaintiff on any point based either upon the exclusion of some of his testimony or the admission of defendant's testimony. In other words, the plaintiff had "his day in court" in the fullest sense of that expression and in view of what we think must be held to be error of law in the action of the Court below refusing to direct a verdict for the defendant, we submit that the judgment must be reversed on that ground.

PAUL SLEMAN,
HARRY F. LERCH.

COURT OF APPEALS
DISTRICT OF COLUMBIA
FILED
MAY-1--1912
Henry W. Hodges
Clerk.

IN THE

Court of Appeals, District of Columbia.

APRIL TERM, 1912.

No. 2392.

THOMPSON-STARRETT COMPANY, A CORPORATION,
APPELLANT,

vs.

JOHN D. WILSON, APPELLEE.

BRIEF FOR APPELLEE.

CHARLES COWLES TUCKER,
HENRY B. F. MACFARLAND,
J. MILLER KENYON,
For the Appellee.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C.

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BRIEF FOR APPELLEE.

Statement of Facts.

This is an appeal from a judgment of the Supreme Court of the District of Columbia, on verdict, in an action by a former servant of the appellant to recover damages for personal injuries alleged to have been caused by its negligence.

The declaration, which is in two counts, alleges that the plaintiff was a carpenter in the employ of the defendant, a construction company, which was engaged in the construc-

tion of buildings in the Naval Hospital grounds in this city; that on February 25, 1910, while engaged in his work, he fell from a ladder in one of the partially completed buildings and was injured. The first count charges that it was necessary for the plaintiff in the performance of his duty as an employee of the defendant, and in obeying its instructions, to use the ladder for the purpose of ascending and descending to and from one floor to another of the building, there being no other means to do so furnished by the defendant to the plaintiff and its other employees, and that it was the duty of the defendant to furnish the plaintiff and such other employees a ladder which should be so fixed and placed in position as to be reasonably safe; that the defendant, in breach of its duty, furnished a ladder about thirty feet long, which the defendant had theretofore so negligently and carelessly fixed and placed, or caused to be fixed and placed, in position that its use by the plaintiff and such other employees was rendered dangerous and unsafe, in that although it extended from the first to the third floor of the building, it was not braced or tied at the point where it passed the second story, which omission to so brace or tie it at that point caused it to swing or vibrate when being used; and also that it was so fixed or placed at the third-floor landing that one of its rungs or steps afforded an unsafe, insecure and dangerous foothold for any one using it for the purpose of ascending or descending; that the plaintiff, on the day he was injured, was descending from the third floor by means of the ladder and lost his foothold by reason of the unsafe and dangerous foothold so afforded as aforesaid, or by reason of both of said causes, and fell and was injured.

The second count charges that in the course of the plaintiff's work and employment it became necessary for him, in the performance of his duties as an employee of the defendant and in obeying its instructions, to use the ladder in question, which had been furnished by the defendant for his use and that of the other employees; that the ladder af-

forded the only means of ascending and descending to and from one floor to another of the building, and that it was of the length mentioned in the first count and was negligently and carelessly fixed or placed in position at the third floor in the manner described therein, of which the plaintiff had no knowledge; that the defendant knew, or in the exercise of reasonable care should have known, of the unsafe and dangerous condition aforesaid, and it was its duty to have warned the plaintiff thereof, so that the plaintiff might have avoided the same in the use by him of the ladder; that the defendant omitted to do so, and by reason of its failure and omission the plaintiff, while in the act of descending from the third floor of the building, to which he had been sent by direction of the defendant and from which it was necessary for him in the course of his employment to return, lost his footing in stepping or attempting to step upon the rung or step which afforded such unsafe and dangerous foothold and fell and was injured.

At the trial there were examined as witnesses for the plaintiff a number of workmen who had been engaged in the construction of the building in question, all of whom were in the employ, at the time, of subcontractors, and also two Government inspectors. There was no motion to direct a verdict at the close of the plaintiff's evidence, and the evidence adduced by the defendant consisted of the testimony of three men, employees of the defendant at the time of the accident. The testimony of both parties tended to show that at the time of the accident the building in question was in a partially completed state; that the ladder was about thirty-five feet long, and that it was fastened permanently at the base and at the third floor. The evidence was conflicting as to whether it was fastened at the second floor at the time of the accident, the plaintiff's witnesses testifying that it was not, while one of the witnesses for the defendant, F. J. Nolte, testified that at the second floor there was a straight piece fastened to the ladder and braced to the floor to keep the

ladder from swinging away (R., 29). The testimony of all of the witnesses agreed that the ladder, fastened at the bottom and at the third floor, as it was on the day of the accident, had been in place for some time before the day of the accident, some of the plaintiff's witnesses testifying that it had been there ever since they had been at work on the building, about five or six weeks before the accident, while another witness for the plaintiff, H. L. Adams, a Government inspector, testified that it had been in place about three months before the accident (R., 22). All of the witnesses for the plaintiff testified that one of the rungs of the ladder just below the third floor had back of it a strip of timber which was so close to the rung that it was impossible for one using the ladder to get a proper foot or toe hold. The testimony of the plaintiff's witnesses briefly as to the exact situation of this rung was as follows:

Herbert C. Jones testified that there was something back of that rung; that there was a piece of studding about an inch behind the rung, and in going up or down the ladder a man could not get a proper foothold, because this studding that was put there would not allow your foot to slip in on the rung; and when you put your foot on the rung you could only get the toe of your shoe, about an inch of it, probably, only the tip of your shoe, on this rung (R., 9).

William A. Colbert testified that at the third floor there was a piece of inch stuff, by two, he thought, on the frame for the cement of the floor, right level with the round or rung; that you could not get a proper foothold there, or if you went to step on your foot would slip right off and come right off of the round; that you could just barely get your foot on there, maybe an inch or so (R., 15).

Charles Kracke testified that at the third floor an inch piece was back of the rung in question, to which the ladder was fastened; that this piece was three-quarters of an inch or an inch above the rung of the ladder at the landing; that it was almost a necessity to step on that rung, where the cleat

was fastened, to land on the top landing; that when a man was standing on the top landing about to descend the ladder, looking down, this cleat looked on a level with the rung (R., 17). This witness also testified on cross-examination, illustrating his testimony by a drawing on the blackboard in the court-room, "that when you put your foot on there, your toe hit here, and there was nothing else for you to do but to slip off, if you were not very careful" (R., 20).

H. L. Adams, a Government inspector, testified that at the top of the ladder, just as one left it, there was a one by three that struck your toe; that as your foot was on the last rung of the ladder the rung hit the foot just about under your toes, that is, just ahead of the ball of the foot, so that it was necessary to hang on very tight at that point (R., 21).

James L. Bowen, another Government inspector, testified substantially to the same effect, saying that you probably had to go by the rung very cautiously, and that if you put your toe on the rung there would be a tendency to hit that little strip of wood (R., 21).

Frank Wall testified that the strip beyond the rung in question projected up above the rung about a half inch, which gave about an inch toehold on the rung (R., 22).

P. J. Corrigan testified that the piece of wood beyond the rung came up about an inch or three-quarters of a inch above the rung (R., 23).

Richard M. Fry testified that there was a board behind the rung in question, which you stepped on in coming down the ladder from the third floor, so that you could not get a toehold, that is, a toehold of more than an inch or an inch and a half (R., 24).

For the defendant, F. J. Nolte, its assistant foreman, testified that behind the rung in question, just below the third floor, there was a header; that the rungs were about an inch and a half or two inches away from the header, and that you could get plenty of purchase on the round for your foot (R., 29).

W. H. Bergmann, for the defendant, testified that there was a strip back of the ladder at the last rung at the third floor that was about a half inch above the rung; that there was about two inches space between the rung and the strip. When asked, "How was it with reference to the foot or toe hold on the rung of the ladder?" witness replied, "Well, I had no trouble with it" (R., 31).

The testimony showed that many of the men had slipped on the rung in question before the accident to the plaintiff.

The witness Jones testified that he knew you could not get a sufficient foothold on the ladder in question, because he had slipped on it himself before the accident in going down the ladder; that he does not know why he did not fall; supposes it was luck; that he happened to save himself with his hands; that he cautioned the fellow that was with him about the rung; that this was about a week or two weeks before the accident to the plaintiff; that his foreman, Kracke, cautioned him and the rest of his men about the rung every time he sent them upstairs to do any work (R., 9-10).

On cross-examination this witness repeated his testimony as to the toe slipping off the rung before the accident and stated that after that he did not use that rung; that he always stepped over it and watched it particularly, and that a man in a hurry would never notice it (R.,14).

The witness Colbert testified that he slipped on the rung in question about two or three days before the accident to the plaintiff; that he did not fall because he caught hold quickly with his hand (R., 15).

The witness Kracke testified that the first time he went up the ladder he slipped at the same point; that when a man was standing on the top landing about to descend the ladder looking down, this cleat looked on a level with the rung, but when witness got down his foot slipped, and when he got down on a level with this rung and this cleat witness found

that it was above the rung, and saw it was dangerous and so notified his men when he went downstairs (R., 17-18).

The witness Wall testified that before the plaintiff was hurt, he, witness, was nearly thrown to the cellar once in coming down the ladder; that he went to step on the rung in question and stepped on the strip first; that it happened he had a good handhold on the ladder, but his foot went right off the rung (R., 22).

The witness Corrigan testified that his attention was first drawn to the rung in question by his foot slipping there one time going up; that his foot did not get a proper bearing; that when he slipped he did not fall because he supported himself with his hands; that he was accustomed to climbing, and supposed that when he felt the give he took extra precaution by putting the rest of the strain on his arms and other foot (R., 23).

The witness Williams testified that he was warned about the rung in question by Clark, one of his fellow-workmen, and for that reason never slipped on it (R., 24).

Concerning the vibration of the ladder by reason of its failure to be tied at the second floor, the witness Kracke, for the plaintiff, testified that he made daily use of the ladder before the accident and that there was a swing or vibration to it, especially so when any one caught hold of it at the top, because the top projected about five or six feet above the top landing, and that naturally gave the ladder a vibration in the center just as soon as you grabbed it; that the vibration was greatest in the center (R., 20).

Further testimony on behalf of the plaintiff, which was not contradicted or denied in any way, was that the ladder in question afforded the only means of going from one floor to another in the building (R., 15); that it belonged to the Thompson-Starrett Company (R., 21); and that it had been in the position it was at the time of the accident, fastened at the base and at the third floor in the manner testified to by the witnesses, for at least three months before the accident.

Concerning the circumstances of the accident itself, the witness Jones, for the plaintiff, testified that at the time the plaintiff fell, he, the witness, was working on the second floor; that witness happened to glance up and saw a shadow over him and saw the plaintiff just as he went to put his foot on the ladder; that as the plaintiff caught hold of the round his toe slipped and down he came; that witness knows what rung the plaintiff put his foot on; that there was something back of that rung; that there was a piece of studding about an inch behind that rung, and in going up or down the ladder a man could not get a proper foothold, because this studding that was put there would not allow your foot to slip in on the rung; that witness saw plaintiff attempt to step on "that rung;" that witness knows that he could not get a sufficient foothold on "that rung" because he had slipped on it himself before the accident (R., 9).

Witness marked with a pencil on a photograph which was admitted in evidence and exhibited to the jury, the rung of the ladder from which he testified the plaintiff's foot slipped (R., 11).

He further stated that the plaintiff landed on the first floor and rolled off the board down to the basement and struck his head on the concrete pit that they had for an elevator shaft (R., 9).

The plaintiff himself testified that he was employed by the defendant and started to work for the defendant about February 7, 1910, at the Naval Hospital; that he started to work on the Officers' Quarters, and after working on other buildings went to work on the building in which the accident occurred about two days before he was hurt; that during that time he worked on the second floor laying sleepers; that before the day he was hurt he was never on the third floor; that before he was hurt he had used the ladder to go to the second floor four times a day; that on the day he was hurt he was ordered by McNulty, the defendant's assistant foreman, to go to the third floor to lay sleepers; that he did so

and took his tools with him, McNulty going up a little ahead of him; that the ladder with the two of them on shook like "old Harry;" that he, the plaintiff, was engaged on the third floor about an hour when he was in need of some more tools and started to get a brace and bit; that he did not remember getting on the ladder; that the next thing he recollected was being in the darkroom at the hospital; that his attention was never called by anybody to any danger of the ladder, and that he did not know of its dangerous condition before he was hurt; that when he went up to the third floor on the day he was hurt he did not have any difficulty in using the ladder; that it is usual with him and usual with mechanics to step from the lower rung on to the landing place, and in doing so, of course, would miss this round which these men speak of; that he did not know anything about the rung, and naturally would miss it in stepping from the lower rung to the landing; that when he went up the ladder to the third floor he gave it no attention whatever, thinking that it was a mechanic that put it in, and that it was all right; that he does not recall looking at it at all; that when he reached the third floor that day he was positive that he stepped on the third floor from the rung below the last rung; that the rung he stepped from was about ten or twelve inches below the floor; that when he went up the ladder that day McNulty said nothing to him about the way the ladder was fastened or mentioned the ladder in any way (R., 26).

The plaintiff also showed by the witnesses Kracke and Colbert that immediately after the accident Kracke said to Nolte, the defendant's assistant foreman, "that damned ladder should be fixed or somebody else will get killed," and that Nolte responded, "The less you say about the accident, the better it will be for you and all hands" (R., 34-35). Foundation was laid for this testimony on the cross-examination of the witness Nolte, who denied that such statement was made to him and that he had made such reply (R., 30).

The plaintiff showed by medical testimony, including that

of the Surgeon General of the Navy, that he was seriously and permanently injured (R., 27-28).

The court granted special instructions asked for by the plaintiff and the defendant (R., 35-38), and charged the jury fully upon the law of the case. While the court denied a prayer by the defendant that upon the pleadings and all of the evidence, their verdict must be for the defendant (R., 36), no reasons were assigned for the prayer, and it does not appear that anything more was done than to formally present the prayer to the court below, in connection with a number of other prayers, some of which were granted and others refused.

There was a verdict for the plaintiff, upon which judgment was entered after a motion for a new trial had been overruled. From the judgment this appeal was taken.

ARGUMENT.

I.

The defendant having abandoned all of its fifteen assignments of error except the eighth, the sole question before the court is whether the lower court erred in refusing to instruct the jury to bring in a verdict for the defendant at the close of all of the testimony as requested by the defendant's first prayer.

The appellant in its brief seems to have entirely misconceived the charge of negligence of the two counts of the appellant's declaration. In neither of the counts did the plaintiff charge the violation by the defendant of any custom in respect to the furnishing of the ladder in question. The charge in the first count is that it was necessary for the plaintiff in the performance of his duties as an employee of the defendant, and in obeying its instructions to use the ladder in question for the purpose of ascending and descend-

ing to and from one floor to another of the incompleted building, there being no other means furnished by the defendant to the plaintiff and its other employees for so doing, and that it was its duty to furnish a ladder which should be so fixed or placed in position as to be reasonably safe. A breach of this duty is then alleged and the particulars of the breach stated. The second count states that it was necessary for the plaintiff in the performance of his duties as an employee of the defendant and in obeying its instructions to use a certain ladder which had been furnished by the defendant for use of the plaintiff and its other employees; that the ladder afforded the only means of ascending and descending to and from one floor to another, and that it was fixed or placed in the manner stated, which, it was charged, was unsafe and dangerous, and, it is further stated, that the defendant knew, or in the exercise of reasonable care should have known, of the unsafe and dangerous manner in which the ladder was so fixed or placed, and it was the duty of the defendant to have warned the plaintiff thereof, so that he might have avoided the same in the use by him of the ladder. A breach of this duty is then charged, and it is stated that while in the act of descending or attempting to descend from the third floor, to which he had been sent by direction of the defendant in the course of his employment, the plaintiff lost his footing in stepping upon or attempting to step upon the rung or step which afforded an unsafe and dangerous foothold and fell and was injured.

The plaintiff's testimony clearly showed, and it was not contradicted, that the ladder belonged to the defendant; that it had been permanently fixed and placed in position, being fastened, at least at the base and at the third floor, some three months before the accident, and more than two months before the plaintiff became an employee of the defendant. In fact, it would seem to have been fixed in the position it was at the time of the accident, long before any of the workmen who testified in the case commenced to work on the

building, for all of the witnesses, both those for the plaintiff and those for the defendant, who were employed in and about the work, testified that it had been in such position during the whole time of their employment, which they place at from three to five weeks. The testimony that it had been there for over three months was that of Adams, a Government inspector (R., 22). There was no denial by the defendant that it had placed the ladder originally in the position in which it was at the time of the accident, and as it was admittedly the owner of the ladder, and as it was fixed in its position when the plaintiff and its workmen were employed, and had been in such position three months before the accident, and as the defendant made no effort to show, as it might well have done, who fixed the ladder in the position that it was when the plaintiff was hurt, it was quite permissible for the jury to conclude that the defendant itself so fixed or placed it. But whether it did so or not is immaterial, for, admittedly, the defendant adopted it in the position it was in.

II.

The appellant contends that a ladder is a tool for performing work. This may well be under some circumstances, but, of course, whether this is true or not depends upon the character of the ladder and the purpose for which it is used. A small portable ladder furnished by a master for use of his servants may, as one of the cases cited by the appellant holds, be "like a spade or hoe, an implement of simple structure, intelligible in all its parts to the dullest intellect;" but a thirty-five foot ladder, permanently fastened at the base and near the top, and used as a substitute for a stairway in and about a building under construction, is a very different thing. This is too plain to need argument.

III.

The appellant contends that the duty of adjusting the ladder in place was that of the appellee and his co-servants.

When the plaintiff and other servants of the defendant who testified in this cause made their contract of employment with the defendant, they found in their place of employment no stairway or other means of ascent and descent from one floor to another, but found there a substitute therefor in this ladder, which had been permanently fixed in place. They were obliged to use it in order to perform their work and to carry out their instructions from the defendant, and they had a right to assume that it was a reasonably safe means of ascent and descent. They did not place it in position, nor had they anything to do with the placing of it in position, and as it was permanently fixed in place they could not shift it or change its position in any respect without tearing it from its fastenings.

It is obvious, therefore, that there was no duty on their part to adjust the ladder in place, as claimed by the appellant. This clearly distinguishes the case at bar from those cited by appellant, in one of which (Quinn *vs.* Fish, 26 N. Y. Supp., 10) the court said, "But to adjust the ladder in place for use was a detail in the execution of their work which it was the duty of plaintiff and his co-servants to perform."

This distinction is recognized in another case cited by the appellant, Kimmer *vs.* Weber, 151 N. Y., 417, in which the court recognized that the master may himself assume to construct a proper platform or place upon which his employees shall stand, and says that if he assumes to do so he will be bound to furnish an appliance reasonably safe and suitable for the purpose.

> "The general supervisory responsibility and control over the work to be done, the place where, and the persons by whom it is to be done, **rest with the master.**

> The same reasoning which shows that the machinery and other instruments of labor should be safe, would demand that the bridges used in passing over one part of the premises to another, or the ladders used in ascending or descending from labor, and the passage-ways in the premises of the employer, and within the precincts of the place where the labor is to be done, should be safe and convenient."
>
> Buzzell *vs.* Laconia Mfg. Co., 48 Me., 212; 77 Am. Dec., 212.

IV.

It is now contended that the plaintiff assumed the risk incident to the use of the ladder.

The appellee, when he entered the employment of the appellant, knew that he had to use the ladder in question, and of course he assumed the ordinary dangers incident to its use. He had the right to assume, however. that the ladder permanently fixed in place as it was was so fixed or placed in position that it was reasonably safe for his use. He assumed the obvious defects; not particular ones of which he had no knowledge, unless they were so obvious that he would be charged with knowledge of them.

> Staubley *vs.* Potomac Electric Power Co., 21 App. D. C., 160.

Whether in this case the defect was such a one as he would have had knowledge of if he had used reasonable care was plainly a question for the jury. He had never descended the ladder before; his attention had never been called to the particular danger in it; and it was a question for the jury whether in descending it the first time he was charged with the duty of peering down the ladder for the purpose of seeing whether each rung afforded a proper foothold before he undertook to descend. He says that in his one ascent he did not observe how the rung was placed, and, in fact, did

not think he used it in such ascent. All of the witnesses who testified in his behalf acquired their first knowledge of the dangerous proximity of the rung to the strip of wood behind it by first slipping from the rung, thus showing very clearly that the defect was by no means an obvious one. They only saved themselves from falling by grasping the side bars of the ladder tightly enough to avoid being precipitated below. The plaintiff, however, unfortunately for himself, had not a sufficiently strong grasp upon the ladder when his foot slipped, and as a result fell and was injured. Certainly it cannot be said that as a matter of law he was chargeable with knowledge of the dangerous condition.

V.

It is argued in appellant's brief that the master is not liable for the negligence of the plaintiff's fellow-servants for not safely placing the ladder in position. As will be presently shown, the fellow-servant rule has no application to this case. But, waiving this point for the moment, the argument here made is based upon the assumption that fellow-servants of the plaintiff fixed the ladder in position. If they did so, there is nothing in the record to so show. Presumably the defendant knew who fixed the ladder, of which it was the owner, in the position it was in at the time of the accident and in the position it had been in for three months prior thereto. It now claims that it was fixed in this position by the fellow-servants of the plaintiff. Who were the fellow-servants, and where is the evidence in support of the statement that it was fixed in position by them? Contention cannot be made a substitute for evidence.

This court has said, by the late Chief Justice Alvey, in Hines *vs.* Georgetown Gas Light Co., 3 App. D. C., p. 378, that:

> "If the injury here complained of was occasioned by the negligence of a coemployee or fellow-servant

engaged in the same common employment with the plaintiff, and for whose negligence the defendant would not be liable to the plaintiff, that is matter of defense to be set up by the defendant, as an answer to the action."

The burden of establishing the relation of fellow-servants between the plaintiff and servant whose negligence caused the injury so as to relieve the defendant from liability is upon him (Bjorman *vs.* Fort Bragg Redwood Co., 104 Cal., 626, in which it was held that the burden is not on the plaintiff to show that the injuries were not caused by the negligence of a fellow-servant).

See also Spring Valley Coal Co. *vs.* Buzis, 115 Ill. App., 196; affirmed in 213 Ill., 341.

Chicago R. Co. *vs.* Mikesell, 113 Ill. App., 146;
Southern R. Co. *vs.* Stewart, 108 Ill. App., 652;
Chicago, etc., R. Co. *vs.* Oyster, 58 Nebr., 1.
Patterson *vs.* Houston, etc., R. Co. (Texas), 40 S. W., 442.

The act of a servant in repairing a ladder will be presumed to be that of a vice-principal, where one of the principals testified that the ladder was repaired the evening before the accident by one of the hands, the presumption being that it was done by the direction of the principal, and a demurrer to the evidence in such case is properly overruled.

Huth *vs.* Dohle, 76 Mo. App., 671.

Negligence in running a train at a time when the track was so unsafe that it should not have been run at all, will be attributed to the railroad company rather than to the fellow-servants of the employee injured thereby, in the absence of evidence as to who directed it to be run.

Stoher *vs.* St. L., I. M. & S. R. Co., 105 Mo., 192.

VI.

The appellant contends that the plaintiff was guilty of contributory negligence in law.

What has been said in answer to the proposition that the plaintiff assumed the risk of his employment bears also upon the proposition here advanced. The question of whether the plaintiff was guilty of contributory negligence was plainly for the jury, and the jury was carefully instructed on this point by the trial court. Indeed, a special instruction asked by the defendant upon the subject, was granted, which told the jury that "if the alleged defective condition of the ladder was so patent as to be plainly observable by the plaintiff, he is presumed to have had knowledge of that condition, and if under such circumstances he used the ladder and was injured, then your verdict must be for the defendant" (R., 38).

On this subject, the court said in his charge to the jury:

> "If the defects or either of them did exist, did Mr. Wilson know of them? Or if he did not know of them, was he careless in not knowing of them? He had a right to rely upon the legal duty of the master which I have just stated, and unless there was something to call his attention to the defect there, he had the right to assume that the ladder was sufficient. You have heard the evidence as to what opportunity he had to discern either or both of these defects if they existed. Did he know of them, or ought he to have known about them in the circumstances? If he knew about them, or ought to have known about them in the circumstances, why then if he used the ladder in his ordinary work, he would assume the risk. That would be the ordinary rule as to workmen" (R., 39).

In Mosheuvel *vs.* District of Columbia, 191 U. S., 247, the Supreme Court held that a woman knowing of a defect

at the bottom of the steps leading from the sidewalk to the front door of her house, was not guilty of contributory negligence as matter of law, when in descending the steps and having the defect in mind, she attempted to step over it instead of to one side, and was injured. In Kane *vs.* Northern Central R. Co., 128 U. S., 91, a brakeman knew that a step was missing from a car, but forgot it for the moment and was injured. Whether he was guilty of contributory negligence was held to be a question for the jury. If mere knowledge, as was in these cases held, of a dangerous defect, is not sufficient to preclude a recovery by the injured person, how can it be said that. in this case, where the plaintiff in terms testified that he had no knowledge whatever of the defect, and where it is admitted that he was descending the ladder for the first time, he was guilty of contributory negligence in law? As shown, all of the other men slipped from the dangerous rung of the ladder before they knew that it was dangerous. If it took such an accident to acquaint them with the danger, how can it be reasonably said that the plaintiff, descending the ladder for the first time, should have known before he slipped that the situation was a dangerous one?

VII.

The theory of the appellant seems to be that the fixing of the ladder in place was a detail of the work which the plaintiff and his co-servants were required or expected to perform. The position of appellee is that the ladder, fixed and placed in position when the men were employed, was an appliance by means of which they were required to perform the labor required of them; and that accordingly the obligation was imposed upon the defendant to exercise reasonable care and prudence in the location and fixing of this appliance, and to see that it was reasonably suitable, and safely placed and fixed in position for the purpose to which

it was applied. If our position in this respect is correct, this duty of the master was primary, and could not be delegated to a servant, so as to shield the master from liability for damages occasioned from the omission of any servant to properly discharge it; and the fellow-servant rule has therefore no application to the case, even if it be assumed that the fixing of the ladder in place was the work of fellow-servants.

Illustrative cases are:

> Kranz *vs.* Long Island R. Co., 123 N. Y., 1, in which it was held that

A servant ordered by the master to perform work as a machinist in underground trenches opened and prepared for him has a right to assume that the place has been made reasonably safe by the master through other and competent servants employed by him, and does not assume the risk of neglect of the latter to brace or protect the sides of the trenches.

Sims *vs.* American Steel Barge Co., 56 Minn., 68, which distinguished the cases in which the furnishing and preparation of a structure is part of the work which the employees are hired to perform.

The same distinction is pointed out in—

In Corson *vs.* Coal Hill Coal Company, 101 Iowa, 224, in sustaining an instruction to the effect that the owner of a coal mine, having a sloping entry through which the coal was brought to the surface, owed to an employee riding in the cars through such entry, the duty of exercising reasonable care to have the roof of the entry sufficiently propped so that rocks would not fall on the tracks, the court said,

> "The rule of the instruction applies to a case where a place is furnished for the servant to do his work and the keeping of the place in repair is not incidental to the work to be performed. * * * The undisputed facts of this case bring it within the latter rule, so far as concerns the duties of the parties. The duties of the plaintiff had no concern with the

> preparation or looking after the entry. It was the general passageway to and from the mine—a completed work; a place in which work was to be done, in no way connected with its construction or preservation. It was a place for such work as the plaintiff was doing and furnished by the employer."

The same distinction is pointed out in Chambers *vs.* American Tin Plate Company, 64 C. C. A., 129; 129 Fed., 561.

There the court said, by Lurton, then circuit judge:

> "There is a line of cases holding that when the employer furnishes suitable materials, and the workmen themselves construct a scaffolding, or staging as a part of the work which they undertake to perform, and build it according to their own judgment, that the employer is not liable for an injury to one of their own number, sustained in the subsequent use of the structure, in consequence of negligence in construction. The erection and re-erection of such a staging as the work requiring its use progresses, being itself a part of the very work which the employees are to do, takes it without the general rule in respect to the duty of the master to exercise reasonable care to furnish a reasonably safe place and appliances. * * * But the rule is quite otherwise if the employer himself undertakes to furnish such scaffolding for the men who are to work thereon. In such a case the duty is one of those positive duties of the master towards the servants which cannot be discharged by the substitution of a competent agent. The act or service to be done is that of furnishing a reasonably safe place or appliances and negligence in the doing of such a service is negligence of the master without regard to the rank of different employees."

Collins *vs.* Danforth, 36 App. D. C., 599, cited by the appellant, plainly belongs to that line of cases first mentioned in the Chambers case, *supra.*

See also

Chicago & A. R. Co. *vs.* Scanlon, 170 Ill., 106.

The distinction drawn by the cases just cited was clearly recognized by this court in Baltimore and Potomac R. Co. *vs.* Elliott, 9 App. D. C., 341. In that case, this court said:

> "The law to govern this case would seem to have been sufficiently settled by the Supreme Court of the United States. In the case of Northern Pacific Railroad Co. *vs.* Herbert, 116 U. S., 642, and in the case of Northern Pacific R. Co. *vs.* Peterson, 162 U. S., 346, the doctrine was stated and reaffirmed that, while an employer is not responsible to a servant for injuries caused by the negligence of a fellow-servant, yet it is his duty to furnish to the servant reasonably safe tools, appliances and machinery for the accomplishment of the work necessary to be done by the servant, *and that the employer may not escape liability by delegating to another the work of furnishing such safe tools, appliances and machinery.*"

See also

McCauley *vs.* Southern R'w'y Co., 10 App. D. C., 560.

Carter *vs.* McDermott, 29 App. D. C., 145.

The *Elliott* case is cited, together with many others, in a very excellent L. R. A. note to Haskell *vs.* Cape Ann Anchor Works, 178 Mass., 485; 4 L. R. A. (N. S.), 220. In the note the law on the subject is summarized as follows:

> "If the appliance is one that the servants are bound to furnish as part of, or as a detail of, their work, then the fellow-servant rule applies, unless the master takes this duty himself. If he does, he must answer to the same extent as if it were his duty to furnish the appliance in the first instance."

A case very much in point is that of Neeley *vs.* S. W. Cotton Seed Oil Co., 13 Okla., 356; 64 L. R. A., 145, in which a laborer was hurt by the breaking of a defective ladder furnished by the master, through his superintendent,

for the work upon which the servant was engaged. The fellow-servant doctrine was held not to help the master. In a case of injury resulting from defective or insufficient appliances, said the court, the relation of fellow-servant does not and cannot arise.

The court also said in that case:

> "The Oil Mill Company had elected to make use of a ladder [instead of a foot board] to put up these belts, and the plaintiff took his employment with knowledge of such mode of doing the work; yet the oil mill company was not absolved from providing a reasonably suitable and safe ladder, and, in the absence of direct knowledge to the contrary, the plaintiff had a right to assume that the company had done its duty, and that the ladder was reasonably suitable and safe for the work which he was required to do."

Where the master undertakes to furnish a complete staging for his servants and assumes such duty, and directs or invites the servant to go out on the staging so constructed which was incomplete and insufficient and the servant as a result thereof was injured, it was held that the master was liable.

Elliott *vs.* Sawyer (Maine), 77 Atl., 782.

Where a master directs its employee to work on a scaffold already built, it is bound to exercise due care in selecting materials reasonably suitable and safe.

Barkley *vs.* S. A. Waste Co. (N. C.), 61 S. E., 565.

See also Flynn *vs.* Staples, No. 2319 (decided February 5, 1912), in which it was held that the administratrix of a deceased servant whose duty it was to draw coffee from a coffee urn attached to boilers and who was killed by the explosion of the boilers had a right to recover against the master, who had failed to cause proper inspection to be made of the boilers.

In this case it is a significant fact that there is no denial from the defendant that it knew of the strip of wood back of the rung upon which the appellee slipped. Both Nolte and Bergmann, witnesses for the appellant, testified that they knew it was there. Nor should it be forgotten that the witness Nolte, who was appellee's superior, and who accompanied the appellee in his only ascent of the ladder to the third floor, gave him no warning to be careful, or intimation that the strip was back of the rung. The defect had existed for months; many of the men had narrowly escaped death by reason of it; every witness who testified except two, the boy Felix Nolte and the appellee, knew of its existence; no inspection had ever been made of the ladder, and apparently there was the utmost indifference on the part of the defendant as to whether the men should be injured or not.

It is difficult to conceive of a greater or more studied case of negligence than the circumstances of this case present.

It is respectfully submitted that the judgment should be affirmed.

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